United States Court of Appeals

for the Second Circuit

APPENDIX

76-7616

United States Court of Appeals

For the Second Circuit

B

P/S

In Re Franklin National Bank Securities Litigation

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,

Plaintiff-Appellant,

and

LOUIS PERGAMENT,

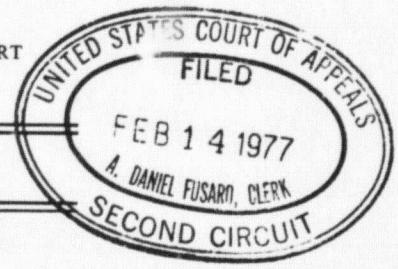
Intervenor-Plaintiff-Appellant,

against

ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, and ROBERT C. PANEPINTO,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK



JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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207/1	75	C 0684	05	05	75	3	850	6				0710	

PLAINTIFFS

GOLD, Robert

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated

DEFENDANTS

ERNST & ERNST, et Al 1

ERNST & ERNST, HAROLD V. GLEASO
PAUL LUFTIG, PETER F. SHADDICK,
MICHELE SINDONA, CARLO BORDONI,
HOWARD D. CROSSE, ANDREW N.
GAROFALO, DONALD H. EMRICH,
ROBERT C. PANEPINTO

PAUL LUFTIG, Third-party plaint
vs.
FEDERAL DEPOSIT INSURANCE COR-
PORATION, JOSEPH A. BEISLER, W
IAM J. HOGAN, SOL KITTAY, CHARL
H. KRAFT, MICHAEL J. MERKIN, JO
SADLIK, NORMAN B. SCHREIBER,
ROBERT N. SEARS, JAMES C. SLAU
JAMES C. SMITH, JOHN J. TUOHY,
FRANK G. WANGEMAN and HAROLD A
WEBSTER, Third-party defendants

CAUSE

VIOLATION OF THE SECURITIES EXCHANGE ACT
74C-894 relates
MDL#196

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SLAUGHTER, TUOHY & WANGEMAN:
Chadbourne, Parke, Whiteside &
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N.Y., N.Y. 10020 541-5800

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARD	
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				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (R

'75 0864 GOLD vs. ERNST & ERNST, et al

A 2

DATE	NR.	PROCEEDINGS
5-75		Copy of order from the Judicial Panel on Multidistrict Litigation transferring above action to this court filed. - Copy of order mailed to Clerk, U.S.D.C.-S.D.N.Y. requesting files. (1)
16-75		Cause on transfer received from U.S.D.C. - S.D.N.Y. filed. (1)
22-75		By JUDD, J. - Order dtd 5-21-75 extending time of defts Hogan, Kittay, Slaughter & Tuohy to answer complaint(third-party) to 6-20-75, etc. filed. (2)
27-75		By JUDD, J. - Orders dtd 5-27-75 extending time of defts Shaddick, Luftig & Panepinto to answer cross-claim to 6-16-75 filed. (3-5)
28-75		By JUDD, J.--Order dtd 5-28-75 extending time of third party defts Merkin & Smith to answer third party complaint to 6-15-75 filed. (6)
9-75		Reply and Supplemental memorandum filed. (7)
11-75		Supplemental summons issued. (8)
11-75		By JUDD, J.-Order appointing person to serve process dtd 6-11-75 filed. (8)
12-75		Supplemental summons retunned & filed. Annexed affidavit of service on Michele Sindona. (9)
17=75		Answer of third party defts Michael J. Merkin and James G. Smith filed. (10/11)
18-75		Pltff's sur-reply memorandum in opposition to motion of Ernst & Ernst to dismiss complaint filed. (12)
19-75		Answer to Cross claim of Carlo Bordoni filed. (13)
19-75		By JUDD, J.-Stipulation dtd 6-18-75 that the time within which deft Ernst & Ernst has to plead is extended to 7-28-75 filed. (14)
19-75		By JUDD, J.-Stipulation dtd 6-18-75 that the time within which deft may plead with respect to cross claim of Robert C. Panepinto filed. (15)
19-75		Defts' memorandum in opposition to motion for class determination filed. (16)
/20/75		Before JUDD,J.- Case called- Both sides present-Pltff's motion to amend complaint argued-Motion granted.
24-75		Answer of Beisler, Hogan, Kittay, Kraft, Slaughter, Tuohy & Wangeman to third-party complaint of Paul Luftig filed. (17)
25-75		Supplemental third party summons issued as to Harold Webster and Robert Sears. (18)
30-75		Answer of deft Peter R. Shaddick to cross-claims filed. (18)
30-75		ANSWER of Carlo Bordoni filed. (19)
30-75		Answer of Carlo Bordoni to Cross claims of Shaddict, Luftig, Panepinto and Garofalo filed. (20)
/1/75		By JUDD,J.- Order dated filed that the time of the deft to answer the cross-claim is extended to July 11, 1975 (21)
/3/75		Answer of Third Party Defts Beisler, et al to Cross Claim of 3rd Party Deft J. Sadlik filed. (22)
/3/75		Answer of 3rd Party Defts Beisler,et al to Cross Claim of 3rd Party Deft J. Sadlik filed. (23)
/3/75		Reply of Deft and 3rd Party Pltff P. Luftig to Counterclaims of 3rd Party Defts M. Merkin and J. Smith filed. (24)
/3/75		Reply of Deft and 3rd Party Pltff P. Luftig to Counterclaims filed. (25)
/3/75		Reply ~~Affidavit~~ of Deft and Third Party Pltff P. Luftig to Counterclaim of 3rd Party Deft J. Sadlik filed. (26)
7-75		Pltffs' reply memorandum and affidavit in support of motion for class determination filed. (27/28)
/7/75		Answer of Deft Michele Sindona filed. (29)
/7/75		Answer of Deft Michele Sindona to Cross-Claims of 3rd Party Defts Beisler, et al (30)

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PLAINTIFF	DEFENDANT	DOCKET NO. 75 C 684
ROBERT GOLD	ERNST & ERNST, ET AL	PAGE 2 OF 2 PAGES

DATE	NR.	PROCEEDINGS
7/7/75		Answer of deft Michele Sindona to Cross-Claim of Deft Peter R. Shaddick filed. (3
7/7/75		Answer to Cross Claim of Deft Andrew N. Garofalo filed. (3
7/7/75		Answer of Deft Michele Sindona to Cross Claim of Deft Robert C. Panepinto filed. (3
7/7/75		Answer of Deft Michele Sindona to Cross Claim of Deft Paul Luftig filed. (3
7/7/75		Affidavit of Jared Specthrie filed. (3
7/7/75		Pltff's Reply Memorandum in Support of Motion for Class Determination filed. (
7-11-75		By JUDD, J.-Stipulation dtd 7-10-75 dismissing the cross-claim interposed by Peter Shaddick against Ernst & Ernst filed. (
7-11-75		By JUDD, J.-Stipulation dtd 7-10-75 dismissing the cross claim interposed by Robert Panepinto against Ernst & Ernst filed. (
7-11-75		By JUDD, J.-Stipulation dtd 7-10-75 dismissing the cross-claim interposed by Paul Luftig against Ernst & Ernst filed. (
7-11-75		Defts' sur-reply memorandum in opposition to motion for class certification filed. (
7-14-75		Reply of third party deft Sadlik to cross claims of third party defts Beisler, Hogan, Kittay, Kraft, Slaughter, Tuohy & Wangeman filed. (
7-14-75		Amended answer of third party defts Beisler, et al. to third party complaint fo deft Paul Luftig filed. (
7-15-75		Pltfts' response to defts' sur-reply memorandum filed. (
7-15-75		By JUDD, J.-Stip. dtd 7-15-75 that the time of Michael J. Merkin and James G. Smith to answer the cross claims of third party deft Shadlick to 8-15-75 filed. (
7-15-75		By JUDD, J.-Stip. dtd 7-15-75 that the time of deft Harold V. Gleason and third party defts Michael J. Merkin and James G. Smith to answer the cross claims of third party defts Beisler, Hogan, Kittay, Kraft, Slaughter, Tuohy and Wangeman is extended to 8-15-75 filed. (
7-15-75		By JUDD, J.-Stip. & Order dtd 7-14-75 that the time of the FDIC to answer with respect to the third party complaint of Paul Luftig is extended to 7-17-75 filed. (
7/17/75		ANSWER of deft Bordoni filed (
7-18-75		Answer to third party complaint of deft Paul Luftig and Cross claim filed. (FDIC) (
7/24/75		Reply to Counterclaim of Third Party Deft FDIC filed.
7-30-75		Third-supplemental summons returned and filed/executed as to Sears. (
8-18-75		Class action interrogatories to pltff intervenor Pergament filed. SEE MDL 196.
8-18-75		Class action interrogatories to pltff Gold filed. SEE MDL 196.
8-18-75		First set of class action interrogatories filed. SEE MDL 196.

(over)

PLAINTIFF	DEFENDANT	DOCKET NO. _____
ROBERG GOLD	ERNST & ERNST, et al	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
8-27-75		By JUDD, J.-Stip. on Order extending deft Cross's time to reply to cross claims to 8-29-75 filed. (51)
8-27-75		By JUDD, J.-Stip. on Order dtd 8-27-75 that the time of deft Sears to appear and answer the third party complaint is extended to 9-15-75 filed. (52)
8-27-75		By JUDD, J.-Stip. on Order dtd 8-27-75 that deft Bordoni's time to answer the first set of interrorgatories is extended to 10-8-75 filed. (53)
8-27-75		By JUDD,J.-Stip. on Order dtd 8-27-75 that the time of deft Gleason and third party defts Merkin & Smith to plead with respect to the cross complaint of t.p. defts Beisler etc is extended to 9-15-75 filed. (54)
8-27-75		By JUDD, J.-Stip. on Order dtd 8-27-75 that the time of the third party defts Merkin & Smith to answer the cross claims of deft Sadlick is extended to 9-15-75 filed. (55)
8/29/75		Reply of deft Howard Crosse to Cross-Claims of 3rd Party Defts Beisler, et al filed. (56)
9-4-75		Answer of Peter R. Shaddick to intervenor's complaint filed. (57)
9-8-75		Intervenor's complaint filed. (58)
9/9/75		Answer of Deft Carlo Bordoni to Intetvenor's Complaint filed. (59)
9-11-75		Answer of Paul Luftig to intervenor's complaint filed. (60)
9-15-75		Answer to intervenor's complaint filed. (61)
9-15-75		Answer of third party deft James G. Smith to cross claims of third party defts filed. (62)
9-15-75		Answer of Harold Gleason to cross claims of third party defts filed. (63)
9-15-75		Answer of Michael J. Merkin to cross claims of third party defts filed. (64)
9-17-75		Answer of third party deft Robert N. Sears to third party complaint of Paul Lufitg filed. (65)
9-19-75		Answer of deft Sadlik to cross claim of James G. Smith filed. (66)
9-19-75		Answer of deft Sadlik to cross claim of Robert Sears and Michael J. Merkin filed. (67/68)
9-22-75		Reply of deft Paul Luftig to counterclaim of Robert H. Sears filed. (69)
9-24-75		Answer to intervenor's complaint filed. (mg) (70)
9-24-75		Answer of Michele Sindona to intervenor's complaint filed. (mg) (71)
10/3/75		Answer of Deft Sindona to Cross claims of Third Party deft Sears filed. (72)
10-10-75		Reply of deft Cross to third party deft Sears filed. (mg) (73)
10/14/75		ANSWER of Third Party Defts Beisler, etc. filed. (to Answer of Cross Claims of Third Party Defts Merkin and Smith) (74) (75)
10/14/75		ANSWER of Third Party Defts Beisler, et al to the Answers of Cross-Claims of Deft Gleason filed. (76)
10/22/75		By JUDD,J.- Order dated 10/21/75 filed that deft Michele Sindona's time to answer Class Pltff's Consolidated Interrogatories Set. No. 1 is extended to Oct 24, 1975 (77)
10/22/75		ANSWER OF DEFT H. GLEASON TO CROSS CLAIMS OF 3rd Party Deft filed (78)
10/22/75		Answer of 3rd Party Deft Michael J. Merkin to Cross Claims of Third Party Deft Sears filed (79)

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO.
75C 684 GOLD	ERNST & ERNST	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
2-13-76		Amended answer of Robert C. Panepinto filed. (102)
2-13-76		Answer of Peter R. Shaddick to amened complaint filed. (103)
2-13-76		Amended answer and cross claim of Carlo Bordoni filed. (104)
2-17-76		Deft. Ernst & Ernst answer to first amended complaint filed. (105)
2-17-76		By JUDD,J.- Order dtd. 2-16-76 extending time to answer for deft. Gleason of amended complaint to 2-20-76 filed. (106)
2-17-76		By JUDD,J.- Order dtd. 2-16-76 extending time to answer amended complaint for deft. Eernst & Ernst to 2-13-76 filed. (107)
2-17-76		By JUDD,J.- Order dtd. 2-16-76 extending time of deft. Sindona to answer amended cokplaint to 2-18-76 filed. (108)
2-19-76		Answer of Michele Sindona to amended complaint and cross claim filed. (109)
2-23-76		Answer to cross claim of Paul Luftig filed. (P. R. Shaddick) (110)
2-23-76		Answer to cross claim of Ernst & Ernst filed. (P.R. Shaddick) (111)
2-23-76		Answer to cross claim of H.D. Cross filed. (P.R. Shaddick) (112)
2-24-76		Aanswer of deft. Gleason to amendeed complaint filed. (113)
2-25-76		Notice of motion ret. 3-12-76 with memo of law re: to bring in third party defendants filed. (114/115)
2-26-76		Answer of deft. Luftig to cross-claim of deft. Ernst & Ernst filed. (116)
2-26-76		Answer of deft. Luftig to cross-claim of deft. Panepinto filed. (117)
2-26-76		Answer of deft. Luftig to deft. cross-claim of Howard Crosse filed. (118)
2-26-76		Answer of deft. Luftig to cross-claim of deft. Sindona filed. (119)
2-27-76		Answer to cross claim of R. C. Penepinto filed.(P.R. Shaddick) (120)
2-27-76		Answer to cross claim of Michele Sindona. (P. R. Shaddick) (121)
2-27-76		
3-3-76		Ernst & Ernst's answer to cross claim of H. Crosse filed. (122)
3-3-76		Ernst & Ernst's answer to cross claim of P. Luftig filed. (123)
3-4-76		Reply of deft. Crosse to cross-claims of deft. Luftig filed. (124)
3-5-76		Answer to cross-claim of deft. Panepinto filed. (125)
3-5-76		Answer to cross-claim of Ernst & Ernst filed. (126)
3-5-76		Answer to cross-claim of deft. Sindona filed. (127)
3-5-76		Answer to cross-claim of deft. Luftig filed. (128)
3-8-76		Answer of deft Gleason to cross-claims defts Ernst & Ernst. Sindona, Luftig & Panepinto filed (129)
3-8-76		Reply of deft Crosse to cross claims of deft. Ernst & Ernst filed. (130)
3-8-76		Answers of Michele Sindona to cross-claims of Paul Luftig and Robert C. Panepinto filed. (131/132)
3-9-76		Answer of Sindona to cross-claim of deft Ernst & Ernst filed. (133)
3-12-76		Reply of H. Crosse to cross claim of H. Sindona filed. (134)
3-18-76		Before JUDD,J.-Case called. Deft's motion to bring in third party actions adj'd to 3-26-76.
3-19-76		Answer of deft R.C. Panepinto to cross claims filed. (135)
3/26/76		Before JUDD,J.- Case called- Deft's motion to bring in 3rd Party Defts-Motion withdrawn
3-29-76		By JUDD,J.-Stip. dtd 3-26-76 withdrawing motion to bring in third party deft filed. (136)

PLAINTIFF	DEFENDANT	DOCKET NO.
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DATE	NR.	PROCEEDINGS
10/22/75		ANSWER of deft (Third Party) J. Smith to Cross Claims of Third Party Deft Sears filed. (80)
10-28-75		By JUDD,J.-Stip. dtd 10-23-75 that the time of pltff Robert Gold to serve an amended complaint with respect to Ernst & Ernst is adj'd without date, provided that pltff shall make such service within 20 days after receiving written notice to serve such amended complaint from any party to this action filed. (mg) (81)
10-28-75		By JUDD,J.-Stip. dtd 10-22-75 that by entering into this stipulation deft, Carlo Bordoni, does not waive his right to refuse to answer any of the said interrogatories etc filed. (mg) (82)
11-3-75		Letter dtd 10-29-75 to J. Judd from Barbara A. Lee filed. (mg) (83)
11-6-75		Letter from Melvyn I. Weiss dtd 10-21-75 (rec'd 10-28-75)filed. (8
11-7-75		Reply of deft Shaddick to cross claim of Robt. Sears.filed. (mg) (8
11-7-75		By JUDDJ-Stip. dtd 11-7-75 that the time for pltff to answer the class action interrogatories is extended to 11-3-75 filed. (8
11-12-75		Answers and objections of pltff to class action interrogatories propounded by third party defts filed. (mg) (8
[illegible]		[illegible] (8
11/24/75		Reply of Deft Peter B. Shaddick to Cross Claim of Third Party Deft Robert H. Sears filed. (8
11/25/75		Answer of Third Party Deft Robert H. Sears to the answer and cross claims of Deft Gleason filed. (8
11/25/75		Answer of Third Party Deft Robert H. Sears to the answers and cross claims of Third Party Defts Merkin and Smith filed (9
12-18-75		Pltff's answers & objections to interrogatories filed. (91
12-18-75		Defts' supplemental memorandum on status of class action filed. (9
12-18-75		By JUDD, J. - Order dtd 12-18-75 adjourning deposition of FDIC sine die, filed in MDL#196.
1-13-76		By JUDD, J. - Order dtd 1-13-76 extending time to file supplemental papers re class motion to 1-22-76, etc. filed. (93)
1-16-76		Amended complaint filed. (94)
1-27-76		Supplemental memorandum of class pltffs in support of Rule 23. (95)
1-27-76		Affidavit of Melbyn I. Weiss filed. (96)
1-28-76		By JUDD,J.-Stip. dtd 1-27-76 extending defts' time to respond to pltffs' supplemental memorandum in support of motion for class action certification to 2-5-76 filed. (97)
1-30-76		By JUDD- Order dtd. 1-29-76 extending time to answer to 2-11-76 filed. (98)
2-5-76		Deft. memo. of law in opposition to class action motion filed. (99
2-11-76		Answer of deft Paul Luftig to amended complaint and cross-claims filed. (100)
2-11-76		Answer of dfet. Crosse to amemded complaint,and cross-claims filed. (101)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 75-C-68
GOLD et al	ERNST & ERNST et al	PAGE ___ OF ___ PAGE

DATE	NR.	PROCEEDINGS
3-29-76		Answer of deft Sindona to cross-claim of deft. Gleason filed. (13
4-6-76		By JUDD, J. - Memorandum and Findings dtd 4-5-76 re class filed in MDL 196.
4-9-76		Before JUDD, J. - Case called. All sides present. Deft's motion to quash argued. Decision reserved.
4-20-76		Answer to cross claim of Michele Sindona filed. (13
4-26-76		Affidavit of service filed (13
5-24-76		Deft Ernst & Ernst answer to cross-claim of R. Panepinto filed. (1
6-4-76		ANSWER of A. Garafalo to amended complaint filed. (14
6-4-76		Answer of A. Garafalo to cross claims of defts Ernst & Ernst, Gleason, Luftig; Shaddick, Sindona, Bordoni, Crosse, Garafalo, and Emrich filed. (14
6-18-76		Shaddick answer to cross-claim of Garofalo filed. (14
6-28-76		Answer of deft Sindona to cross-claim of deft Garofalo filed. (14
6-30-76		Answer of Luftig to cross-claim of Garofalo filed, (145
6-30-76		Answer to cross claim of Harry P. Barrand, Jr. filed. (14
7-6-76		Reply of H. Crosse to cross claim of A. Garofalo filed. (14
7-6-76		Answer to cross claim of Andrew N. Garofalo filed. (14
7-14-76		By DOOLING, J.--MEMORANDUM AND ORDER DTD 7-13-76 filed that the document submitted in camera to Judge Judd marked "FNB Problem Bank Memorandum" be sealed and kept confidential until its consideration by the judge to whom the case is re-assigned. ((Sealed envelope with said memorandum placed in vault). (14
8-12-76		Answer of Carlo Bordoni to cross claim of A.N. Garofalo filed. (15
8-30-76		Before PLATT,J.- Order dtd. 8-26-76 setting 9-3-76 fo conffiled. (15
9-03-76		Before PLATT, J. - case called - court appoints Committee on Discovery. Deft FDIC's motion to quash subpoena on grounds of confidentiality (decision reserved - Judd,J. 4/9/75) is granted and denied as indicated on the record.
9-17-76		Memorandum in support of class action order filed. (1
9-20-76		Affidavit with memo of law to certifiy as class action filed (153-1
9-20-76		Affidavti of P. Koepff re: to certifif as class action filed. (1
9-23-76		Reply memo of law in support of pltff;s propposed coass action order filed. (1
10-28-76		By PLATT,J.- Memo and order dtd. 10-27-76 that the attys for the parties herein should confer and submit an appropriate order as soon as possible not inconsistent with this memo and order etc., See Order, filed. copies mailed. (1
11-11-76		Revised notice of motion ret. 11-19-76 with memo of law to amend order dtd. 10-27-76 filed. (158/159
11-30-76		By PLATT,J.- Order certifiing class and designating manner and time of notice etc., filed. (16
11-30-76		By PLATT,J.- Supplemental memo and order granting pltff's motion to reargue portion of order dtd. 10-27-76 as to class expense etc., see order, filed. (16

DC-111A (Rev. 1/

IL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. _____ PAGE ____ OF ____ PAGES

DATE	NR.	PROCEEDINGS
2-2-76		Notice to take depostitton of Dennis Weatherstone and Morgan Guaranty Trust Co. on 1-27-77 at 10 AM and 2;30 PM filed. (162)
2-6-76		Notice of motion ret. 11-17-76 to reargue order dtd. 10-27-76 filed. (163)
2-9-76		Notice of appeal filed. (164)
2-9-76		Undertaking for costs on appeal filed. (165)
2-13-76		Class Plaintiff's petition for permission to appeal filed. (166)
-20-76		Letter dtd 11-18-76 to J.Platt from Jerome M. Congress re defts' memo in opposition to plntffs' pending motion for reargument or Section 1292(b) certification etc. filed. (167)
-20-76		Letter dtd 9-24-76 to J.Platt from Paul R. Koepff re error in affidavit submitted in support of the proposed counterorder certifying the class etc. filed. (168)
-20-76		Unsigned order certifying class and designating manner and time of notice filed. (169)
-27-76		Civil appeal scheduling order filed. (170)
4/77		Letter to Platt, J dtd 12/21/77 re progress made in complying with the direction Platt gave 11/30/76 concerning notification of nominees etc filed. (171)
10-77		Second civil appeal scheduling order filed. (172)
12/77		Letter of Jerome M. Congress to Platt, J dtd 1/6/77 filed re that defts have provided pltffs with a revised list of companies listed on certain transfer records of the Franklin New York Corp; letter is to inform Platt,J that pltff's have now mailed copies of the letter together with copies of Platt's,J memo and order to each company. (173)
13-77		By PLATT, J.--Order designating part of record for appeal filed. See order. Copy in file. (174)
18-77		Letter of Milberg & Weiss to Judge Judd dtd 2-2-76 filed re: supplemental memorandum of class pltffs, etc. (175)
18-77		letter of Milberg & Weiss to Judge Judd dtd 2-23-76 filed re: class determination, etc. with copy of related opinion. (176)
18-77		Memorandum of certain defts in opposition to class pltffs' motion for reargument (dtd 11-15-76) filed. (177)
18-77		Letter of Poletti Freidin, et al. to Judge Platt dtd 11-22-76 filed re: motion for reargument with copy of related papers. (178)
18-77		Unsigned order certifying class and designating manner, etc filed. (179)
18-77		Unsigned counter order certifying class, etc filed. (180)
18-77		Unisgned revised order certifying class & designating manner, etc. filed. (181)
18-77		Copy of Judge Judd's memorandum and finding dtd 7-17-75 filed. (182)
-21-77		Above record certified (docs. as per stip--see copy in file) and handed to Jerry Congress for delivery to C of A.
24-77		Acknowledgment rec'd from C of A for receipt of record on appeal & filed. (183)
-25-77		ANSWER of deft Howard D. Crosse to amended complaint of intervenor Louis Pergament filed. (184)
-25-77		ANSWER of deft Sindona to intervenor's amended complaint and cross claim filed. (185)

Continued

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 75C-684
GOLD, et al	ERNST & ERNST, et al	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS	
1-26-77		By PLATT, J. - Order dtd 1-24-77 extending time of Ernst & Ernst to answer amended complaint to Louis Pergament to 1-28-77 filed.	(18
1/27/77		Answer of deft Harold Gleason to amended complaint filed.	(18
2-1-77		Answer of Paul Luftig to amended complaint of Louis Pergament filed.	(183

District Court Docket Entries in
Multi-District Litigation #196

A 10

DIST./OFFICE	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	O	R	23	S	OTHER	NUMBER	DEM.	YR.	NUM
207/1	MDL#	196	05	05	75	3	850	6					0716			

PLAINTIFFS | DEFENDANTS

IN RE FRANKLIN NATIONAL BANK
SECURITIES LITIGATION

CAUSE

RELATED CASES:
74C-894, 74C-1174, 74C-1256, 74C-1372, 74C-1379, 74C-1451
75C-682, 75C-683, 75C-684, 75C-685, 75C-791 75C-2144 76C-1102 76C 1851

ATTORNEYS

SEE DOCUMENT #153 FOR LIST OF ATTORNEYS

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARD	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAIL
				JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev

MDL 196 IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION

DATE	NR.	PROCEEDINGS
5-5-75		Certified copy of order from the Judicial Panel on Multidistrict Litigation transferring actions listed on the attached Schedule A to the U.S. District Court for the Eastern District of New York filed. (1)
5-5-75		Attorney service list of MDL filed. (2)
5-8-75		By JUDD, J. -Order dtd 5-8-75 re practice and procedure, and setting 5-30-75 at 2 P.M. for first pre-trial conference filed. (copies mailed to attys). (3)
5-16-75		Four causes on transfer (75C-682 through 75C-685) received from U.S.D.C.-S.D.N.Y. and filed in their respective files. Acknowledgment for receipt mailed to Clerk USDC-SDNY. ---
5-22-75		Judicial Panel on Multidistrict Litigation apprised of new case (75C-791) related to MDL #196.
5-29-75		Proposed agenda submitted by pltffs for 5-30-75 first pre trial conference filed. (4)
5-30-75		Before JUDD, J.-Case called. Counsel for both sides present. Conference held and concluded. Liaison counsel agreed upon. Case adj'd to 6-13-75 for hearing on remand motion and to 6-20-75 for hearing on motions for class action.
6-4-75		Stenographer's transcript dtd 5-30-75 filed. (5)
6-10-75		Notice of motion ret 6-20-75 for an order dismissing the cross claim of deft Paul Luftig filed with Memorandum of Law in support of the motion. See 74C 1174. --
6-10-75		Notice of motion ret 6-20-75 for an order pursuant to Rule 17 of FRCP filed with Memorandum in support. See 74C 894. --
6-10-75		Notice of motion ret 6-20-75 for an order to transfer this action to the Eastern Dist. etc filed with Memo in support of motion. See 75C 685. --
6-10-75		Notice of motion ret 6-20-75 for an order dismissing the complaint as against the FDIC filed with Memorandum of Law in support of motion. See 74C 1451. --
6-11-75		By JUDD, J.-Order appointing person to serve process dtd 6-11-75 filed. See 75C 684. --
6/16/75		By JUDD,J.- First Conference Memorandum dated 6/13/75 filed. (6)
6-17-75		Answer of third party deft James C. Smith, and Answer of third party deft Michael J. Merkin filed. See 75C 684. --
6-17-75		Answer of third party deft James C Smith and Answer of third party deft Michael J. Merkin filed. See 75C 683. --
6-19-75		Notice of motion for an order that Sol Neil Corbin be substituted for Franklin New York Corp, etc. filed.(ret 6-20-75). (7)
6-19-75		Pltff Gold's memorandum of law in opposition to FDIC's motion motion for realignment filed. (8)
6-19-75		Affidavit of Jared Specthrie in opposition to motion of FDIC for realignment filed. (9)
6-19-75		Affidavit of service filed. (10)
6/20/75		Answer of Third Party Deft John Sadlik filed. (11)
6/20/75		Answer of Third Party Deft John Sadlik filed. (12)
6/20/75		Joint Memorandum of Indiv Defts in Response to Motions of FDIC filed (13)
6/20/75		Memorandum of Pltff in Opposition to Motion for Realignment , Substitution, Control of Derivative Claims, and Consolidation filed. (14)
6-23-75		ANSWER of Michele Sindona to Cross Claims filed. (15)
7/9/75		Affidavit of Service filed. (16)

Continued

PLAINTIFF	DEFENDANT	DOCKET NO. MDL #196
IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION		PAGE ___ OF ___ PAG

DATE	NR.	PROCEEDINGS
7-10-75		Letter dtd 7-7-75 to J. Judd from Raymond S. Fersko filed.
7-10-75		Letter dtd 7-7-75 to J. Judd from Wachtell, Lipton Rosen & Katz filed.
7-10-75		Letter dtd 7-7-75 to J. Judd from Amalya L. Kearse filed.
7-10-75		Letter dtd 7-1-75 to J. Judd from Raymond S. Fersko filed.
7-10-75		Notice of settlement of order filed.
7-10-75		By JUDD, J. - Order dtd 7-8-75 that the motion of FDIC is granted to the extent that in each of the captioned actions except Pergament, 1) the Receiver is realigned as party pltff, 2) that FDIC is substituted for the Receiver as party pltff, 3)FDIC is granted exclusive control over the prosecution of all claims asserted on behalf of the Bank, and 4)said actions are consolidate for all purposes in the Eastern District of New York under the title of Rothman v. Andersen, et al, 74C-894, except that the claim asserted against Loews in Kanner is excluded from said consolidation, etc. See order. (document #21).
7-10-75		By JUDD, J. - Memorandum dtd 7-8-75 re the above order filed.(p/c)
7-15-75		Notice of motion ret 7-25-75 for an order re Sol Neil Corbin intervene as a deft in the action filed.
7-16-75		Notice of motion ret 7-25-75 for an order dismissing the Pergament complaint etc.filed with Memo of Law in support. (24
7-17-75		Letter dtd 7-16-75 to J. Judd from William Sparks filed with corrected copy of Exhibit B attached.
7-17-75		Answer of Michele Sindona to Cross Claims of defts Beisler, et al filed.
7-18-75		By JUDD, J. - Matters which the Court proposes to consider at the second pretrial conference filed.
7-21-75		By JUDD, J. - Order dtd 7-18-75 re substitution of attys filed.
7-21-75		Notice of motion ret 7-25-75 for an order remanding pltff's action to the U.S. D.C./SDNY filed. (S.E.C.).
7-21-75		Memorandum of law in support of pltff motion to remand filed.
7/24/75		Affidavit of Louis Pergament filed.
7/24/75		Memorandum of Law in Support of Motion toAmend Complaint and to Intervene filed.
7-25-75		ANSWER of Peter R. Shaddick to counterclaim of deft FDIC filed.
7/29/75		Before JUDD, J. - Case called. Pltff's Commissions motion for remand, etc. Decision reserved. Motions to dismiss Pergament,etc. Motions argued. Decision reserved pending submission of Briefs.
7-30-75		Stenographer's transcript dtd 7-25-75 filed.
7/31/75		Class pltff's Request for Production of Documents filed.
7/31/75		Class pltff's consolidated interrogatories Set. No. 1 filed.
8/1/75		Letter dtd 7/31/75 filed from B. McCarthy to J. Judd.
8-02-75		By JUDD, J.-Memorandum and Order dtd 8-1-75 denying motion of pltff Pergament to amend his complaint; granting the motion of pltff Pergament to intervene in the Gold action; that the complaint in the Pergament action be dismissed etc. See memo.
8-02-75		Notice of settlement of order filed.
8-02-75		By JUDD, J.-Order dtd 8-1-75 that the Trustee has leave to intervene and made a party deft in actions 74C 1256; 74C 1372; 74C 1379; and 75C 683. See order. Filed on document #40
✓ 8-15-75		Peter Shaddick's memorandum in support of his application to preve the release of his SEC testimony filed.

(over)

MDL 196
CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	A 13
FRANKLIN NATIONAL BANK		DOCKET NO. _____
		PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
8-15-75		Notices to take the depositions of: European Merican Bank & Trust Co; Manufacturers Hanover Trust Co; Loews Corp; and Laurence A. Tisch filed. 42-45
8-18-75		Class action interrogatories to pltff intervenor Pergament filed. 46
8-18-75		Class action interrogatories to pltff Gold filed. 47
8-18-75		First set of class action interrogatories filed. 48
8-20-75		Notice of deposition upon oral examination of Donald Emrich; Peter R. Shaddick; Carlo Bordoni; and Michele Sindona filed. 49
8-27-75		By JUDD, J. = Order dtd 8-27-75adjourning deposition of Carlo Bordoni to 9-29-75 filed. 50
8-29-75		Letter dtd 8-1-75 from Charles B. Pearlman filed. 51
8-29-75		Letter dtd 8-18-75 from Charles B. Pearlman filed. 52
8-29-75		Letter dtd 8-13-75 from Charles B. Pearlman filed. 53
8-29-75		Letter from Daniel F. Kolb dtd 8-13-75filed. 54
8-29-75		Class pltffs' reply memorandum in opposition to application to prevent release of testimony in SEC transcripts filed. 55
9-3-75		By JUDD, J. - Order dtd 9-3-75extending time of deft Sindona to seek a protective order, etc. to 9-5-75 filed. 56
9-4-75		By JUDD, J. - Order dtd 9-4-75 extending time of FDIC to answer class pltffs' consolidated interrogatories to 10-17-75, filed. 57
9-4-75		By JUDD, J=Stipulation on Order dtd 9-4-75 that the time of each individual deft who was served with process in any of the above actions (see stip.) to move, answer or object to "Class Pltffs' Consolidated INterrogatories" Set Number 1 dtd 7-28-75 is extended to 10-17-75 filed. SEE STIP. 58
9-5-75		By JUDD, J.--Order dtd. 9-4-75 extending time for FNYC & Corbin to respond to production of documents or answer interrogatories to 10-17-75 filed. 59
9-5-75		By JUDD, J.--Order dtd. 9-4-75 extending time for FNYC & Corbin to respond to pltffs' complaints to 9-9-75 filed. 60
9-5-75		Letter from Charles B. Pearlman dtd 9-3-75 filed. 61
9-5-75		Copy of letter from Chambers to Charles Pearlman dtd 9-5-75filed. 62
9-8-75		By JUDD, J.-stip. on Order dtd 9-8-75 that the time of each individual deft who was served with process in any of the MDL actions to respond or object to 'Class Plaintiffs' request for production of documents" dated 7-28-75 is extended to and including 10-28-75 filed. 63
9-9-75		Answer to intervenor's complaint filed. 64
9-9-75		By JUDD, J.-Stip. on Order dtd 9-9-75 adjourning the deposition of Michele Sindona to 1-16-75 filed. 65
9-9-75		By JUDD, J.-Memorandum and Order dtd 9-9-75 that the objections of deft Peter Shaddick to release to counsel in the consolidated cases of his testimony before the S.E.C. be denied filed. 66
9-9-75		By JUDD, J.-Stip. on Order dtd 9-9-75 that the time of each individual deft who was served with process in any of the above actions (see stip.) to respond or object to "Class Plaintiffs' Request for Production of Documents" dtd 7-28-75 is extended to and including 10-28-75 filed. 67
9-16-75		Notice of motion to condolidate, ret 10-3-75 at 10 A.M. filed. 68
10-9-75		Letter dtd 9-26-75 to J. Judd from C. B. Pearlman filed. (mg) 69
10-15-75		Copy of letter dtd 10-10-75 to J. P. McGrath from A. Kearse filed. (70)

CONTINUED

MDL 196
CIVIL DOCKET CONTINUATION SHEET

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PLAINTIFF	DEFENDANT	DOCKET NO.
FRANKLIN NATIONAL BANK		PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
10-17-75		Affidavit of John J. Kirby Jr. in opposition to SEC's motion for issuance of letters rogatory filed. (7
10-17-75		Answers of James G. Smith, Harold V. Gleason, William B. Lewis, Jr., and Michael J. Merkin to interrogatories filed. 72-7
10-20-75		By JUDD, J. - Order dtd 10-17-75 extending time of Franklin N.Y. Corpand Sol Neil Corbin to answer request to produce to 10-24-75 filed. (76)
10/21/75		Responses of Deft H. Crosse to Class Pltff's consolidated interrogatories filed. (77)
10/23/75		Answers of Paul Luftig to Pltff's Interrogatories filed (78)
10-23-75		Objections to class pltffs' consolidated interrogatories filed. (mg) (79)
10-23-75		Answers to class pltffs' consolidated interrogatories filed. (80
10-23-75		Response to class pltffs' request for production of documents filed. (mg) (81
10-23-75		Affidavit of service filed. (mg) (8
10/24/75		Franklin Trustee's Answers to Class Pltff's Consolidated Interrogatories filed. (8
10/29/75		Response of deft Howard D. Crosse to Class Pltff's request for production of documents filed. (
10/29/75		Response to Class Pltff's Request for Production of Documents by Defts Gleason, et al filed. (
10/29/75		Response of Deft Michele Sindona to Class Pltff's consolidated interrogatories Set Number 1 filed. (
10-30-75		Response to deft Sindona to class pltffs' request for production of documents filed. (mg) (
10/31/75		Response to Class Pltff's Request for Documents filed (
10/31/75		Answers of deft [illegible] Shadick to Class Pltff's Consolidated Interrogatories Set Number One filed. (
10/31/75		Response of deft Paul Luftig to Class Pltff's Request for Production of Documents filed
11/6/75		By JUDD,J.- Order dated 11/5/75 filed, that new counsel for Raymond T. Andersen will attempt to answer Class Pltff's Interrogatories ,etc. by 11/28/75, etc. (
11-10-75		Answer of Robert C. Panepinto to class pltffs' consolidated interrogatories file.d (mg) (
11-11-75		By JUDD, J.--Order dtd 11-10-75 setting third pretrial conference for 12-12-75 filed (copies sent to counsel by chambers) (
11-13-75		Clerk's notice setting 12-18-75 at 2 P.M. for pre-trial conference filed. (9
11-18-75		Letter dtd 11-13-75 to J. Judd from Charles B. Pearlman filed. (9
11-21-75		Letter dtd 11-18-75 to Clerk from Rose Washington filed. (
11/26/75		ANSWER of deft Carlo Bordoni to Class Pltff's Consolidated Interrogatories Set Number One filed
11-26-75		By JUDD,J. - Order dtd 11-26-75 substituting attys for deft Raymond T. Andersen filed. (

-OVER-

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO.
IN RE FRANKLIN NATIONAL BANK		PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
12-1-75		Copy of letter dtd 11-24-75 from Jerome Congress with affidavit of Melvyn I. Weiss attached. (99)
12-1-75		By JUDD,J.=Stip. & Order dtd 11-26-75 substituting attys filed. (100)
12-1-75		By JUDD,J.-Stip. & Order dtd 11-25-75 substuting attys filed. (101)
12/1/75		Notice of Deposition of Federal Deposit Insurance Corp. filed. (102)
12/1/75		Deft's Raymond T. Andersen's Response to Class Pltff's Request for Production of Documents filed. (103)
12/1/75		Notice of Deft Raymond T. Andersen to Class Pltff's consolidated interrogatories, Set No. One, filed. (104)
12/1/75		Notice of substitution of attys for deft R. Andersen filed (105)
12-11-75		Notice of substitution of attys filed. (mg) (106)
12-11-75		Notice of substitution of attys filed. (mg) (107)
12-18-75		By JUDD, J. - Order dtd 12-18-75 adjourning deposition of FDIC sine die filed. (108)
12-18-75		Before JUDD, J. - Case called. All sides present. Pre-trial conference held & concluded. Deadlines set on record for completion of various phases of discovery. Case adj'd to 6/76 for further conference.
12-29-75		By JUDD,J.-THIRD CONFERENCE MEMORANDUM dtd 12-24-75 filed. Copies mailed to all counsel & Mr. Emerich from Chambers. (mg) (109)
12-29-75		Stenographer's transcript dtd 12-18-75 filed. (mg) (110)
1-20-76		By JUDD, J. - Final judgment of permanent injunction by consent as to Carlo Bordoni filed in 75C-682.
1-23-76		Supplemental memorandum of class pltffs in support of motion for class certification filed. (111)
1-23-76		Affidavit of Melvyn I. Weiss in support of motion by class pltffs for certification of the class, etc filed. (112)
1-23-76		Affidavit of Robert M. Kornreich in support of class ccertification filed. (113)
3-1-76		By JUDD,J.- Order dtd. 2-27-76 substituting of attorneys filed. (114)
3-24-76		Copy of letter of Christopher F. Meatto dtd. 3-17-76 filed re: adjment of deposition. (115)
3-24-76		By JUDD, J.--Order dtd 3-24-76 filed that writs of habeas corpus ad testificandum be issued to bring Emrich, Slutzky, & Garofalo to the Metro. Corr. Center for the purpose of taking their testimony, etc. filed. (116)
3-25-76		Notice of motion ret. 4-2-76 with memo of law in support of motion to quash pltff's subpoena duces tecum etc., filed. (117/118)
3-29-76		Notice of adjournement of motion ret. 4-2-76 to 4-9-76 filed.. (119)
3-29-76		**Notice of motion ret 4-2-76 for leave to take depositions of persons in prison filed.** (120)
3-31-76		Affidavit of Leonard Rivkin filed. (121)
3-31-76		Notice of adjournment of motion ret. 4-2-76 to 4-9-76 filed. (122)
4-2-76		**Notice of motion ret 4-9-76 for an order re depositions of persons confined in prison filed.** (123)
4-6-76		By JUDD, J. - Memorandum and Findings dtd 4-5-76 re class, etc. filed. Counsel for pltff Gold to submit order on three days notice. (p/c mailed to attys). (124)

CONTINUED

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. MDL 196
IN RE FRANKLIN NATIONAL BANK		PAGE ___ OF ___ PAGE

DATE	NR.	PROCEEDINGS
4-8-76		Joint memorandum of individual defts in opposition to FDIC's motion to quash subpoena filed. (125
4-8-76		Class pltffs' memorandum of law in opposition to motion of FDIC to quash pltffs' subpoena filed. (126)
4-8-76		Notice to take deposition of Robert F. Moreschi filed. (127)
4/9/76		Affidavit in Reply to FDIC Notice of Motion filed. (128
4-09-76		Affidavit of James M. Shaughnessy in reply to ptlffs' memo of law etc. filed. (129
4-09-76		FDIC's memo of law in support of its motion to quash pltffs' subpoena duces tecum filed. (130
4-22-76		Letter dtd 4-20-76 to J. Shaughnessy from H. Wachtell filed. (131
4-22-76		Letter dtd 4-19-76 to Steven M. Berna from J. Shaughnessy. (132
4-29-76		Copy of letter dtd. 4-26-76 from Stu Barna to James Shaughnessey filed. (133
5-4-76		By JUDD J.- Order to take dppositions of Emrich, Slutzky, Garofalo, Romersa, Keroes, and Sabatella etc., filed. (13
5-5-76		By JUDD,J.-Writs of habeas corpus issued as to Martin Keroes; Michael Romersa; and Paul Sabatella. ---
5-6-76		Writs of habeas corpus as to Martin Keroes; Michael Romersa and Paul Sabatella ret & filed/executed. (135
5-20-76		Letter dtd. 4-30-76 from M. Finkelstein to Judge Judd filed. (136
5-20-76		Letter dtd. 4-21-76 fomm J. Feldman to Judge Judd filed. (137
5-20-76		By JUDD,J.- Order dtd. 5-19-76 modifying Court order dtd. 5-4-76 re: to reopen depositions etc., See Order filed. (138
5-24-76		Memo of law in support of trusstees motion to compel A. Garofalo to testify at his deposition filed. (139
5-24-76		Before JUDD,J.- Case called Attys present Trustee's motion, by Order to Show Cause, to compel A. Garofalo to trstify at his deposition, disposed of ~~mx~~ orally from the Bench as indicated on the Record John Nigro appointed as Counsel by Court for Mr. Garfalo in today's proceedings Order signed
5/25/76		Letter dated 5/19/76 filed from A. Garofalo to J. Juddd (14
5/25/76		By JUDD,J.-Order dated 5/24/76 filed to Uhow Cause why an order should not be made compelling answers by Andrew Garofalo in his depposition in these and other related actions,etc., ret. 5/24/76 (14
5-25-76		By JUDD,J-Appointment voucher filed. Copy to AO. (~~13~~)
5-26-76		By JUDD,J.- Order dtd. 5-24-76 relieving J. Nigro as counsel for the deft filed. (1
6-4-76		By JUDD,J-Memorandum to Counsel dtd 6-3-76 filed. Copies mailed from Chambers. mg (1
6-4-76		Lettter dtd 5-19-76 to J. Judd from C. F. Meatto filed. (1
6-4-76		Letter dtd 5-14-76 to J. Judd from R.H. Alenstein filed. (1
6-4-76		Letter dtd 5-18-76 to J. Judd from J. Paul McGrath filed- (1
6-4-76		Letter dtd 5-17-76 to J. Judd from W.E. Kelly filed. (1
6/7/76		Letter from Bernard McCarthy dated 6/4/76 filed (1
6/7/76		By JUDD,J.- Order on stipulation dated 6/7/76 with regard to filing of answers,and cross-claims and complaints etc. filed (1
6-11-76		Sten. transcript dtd. 5-24-76 filed. (1

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. MDL 196
		PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
7-12-76		Affidavit of Leonard L. Rivkin filed. (152)
7-14-76		By BOOLING, J.--MEMORANDUM ANDORDER DTD 7-13-76 filed in 75 C 634 that the document submitted in camera to Judge Judd marked "FNB Problem Bank Memorandum" be sealed and kept confidential until its consideration by the judge to whom the case is reassigned. (Sealed envelope with said memorandum placed in vault). ---
7-19-76		Copy of letter of Chief Judge Wisbler to counsel dtd 7-16-76 filed with attachments re: notification of reassignment of actions in MDL #196 to Judge Platt. (153)
7-23-76		Notice of motion ret. 7-30-76 to amend complaint filed. (154)
7-30-76		Before PLATT,J.- Case called for motion for Pergament to amend complaint granted without opposition
8-20-76		Letter from MDL Panel dtd 8-18-76 filed with annexed certified copy of order reassignment litigation to Judge Platt. (155)
8-23-76		Affidavit of Michael O. Finkelstein filed. (156)
8-25-76		Affidavit of Jeffrey Silberfeld filed. (157)
8-25-76		Affidavit of Edward C. McLean Jr. filed. (158)
8-25-76		Notice of change of address for Poletti, Friedman etc., filed. (159)
9-7-76		Notice of continued depositions filed. (160)
9-13-76		Befpre PLATT,J-Case called. Court appoints committee on discovery.
9-16-76		Letter dated 9/10/76 from attys for Corbin and FDIC re: discovery filed. (161)
9-23-76		Letter dtd. 9-20-76 from J. Morin to all counsel re: documents ready for inspection filed. (162)
9-27-76		Sten. transcript dtd. 8-27-76 filed. (163)
10-7-76		Notice to take deposition of R. Andersenfiled. (164)
10-12-76		Notice to take deposition of Fakhry Basta Hanna filed. (165)
10-14-76		Renotice to take deposition Raymond Andersen filed. (166)
10-18-76		Notice to take depositions of M. Matwijiw and L. Lashly filed. (167)
10-20-76		Notice of cont'd deposition of A. Slutsky filed. (168)
10-22-76		Notice to take deposition of Peter R. Shaddick filed. (169)
11-11-76		BY PLATT,J.- Order dtd 8-24-76 granting Plaintiff-Intervenor's motion to amend Plaintiff-Intervenor's complaint, etc. filed. (170)
12-15-76		Letter dtd 12-10-76 to Jerome M. Congress from Sara E. Steinbock. (17
12-20-76		Letter dtd 11-3-76 to J. Platt fror Jerome M. Congress re production of documents. (17
12-21-76		BY PLATT, J.- order dtd 12-17-76 directing FDIC,pursuant to the Third Conference Memorandum signed by the Hon. Orrin G.Judd on 12-12-75 to produce all relevant personnel files pertaining to former officers and employees of the Franklin National Bank and make the files availabl to all parties to the Franklin National Bank Litigation etc. filed. The order also directs that these files be kept confidential by all parties etc. (see order) (173
1/4/77		Notice of Motion filed. (174
1/4/77		Memo of law filed (175)
1-5-77		Letter dtd 12-29-76 to J. Congress from Sara E. Steinbock re revised list of nominee names of beneficial owners of FNB securities.

(cont'd)

CIVIL DOCKET CONTINUATION SHEET

A 18

PLAINTIFF	DEFENDANT	DOCKET NO. MDL#196
Franklin National Bank		PAGE 5 OF 5 PAGE

DATE	NR.	PROCEEDINGS
1/6/77		Letter to Mr. Caruth from Mr. Koepff dtd 10/28/76-Mr. Caruth have been asked by the law clerk of Platt, J to respond to an inquiry of Judd, J etc. filed. (177
1-10-77		Affidavit in opposition to FDIC motion to terminate deposition of Norman B. Schreiber filed. (Robert C. Myers) (178
1-10-77		Affidavit of Barbara A. Lee filed. (179
1-10-77		Affidavit in opposition to motion to terminate deposition of Norman B. Schreiber filed. (Edward C. McLean) (180
1-12-77		Affidavit of Jerome M. Congress. (18
1/14/77		Before Platt, J--case called-FDIC's motion for protective order argue-denied--court directs that Mr. Schneider be made available for deposition on or before & no later than ~~XXXXX~~ 1/28/77 and thereafter on a day-to-day basis until 2/4/77. Civil Motion-motion to terminate deposition of Norman b Schreiber etc.
1-18-77		Affidavit in opposition to FDIC motion to terminate deposition of Norman B. Schreiber. (18
1-18-77		Affidavit of John T. Morin filed. (18
1-18-77		Affidavit of Harvey Weinig filed. (18
1-18-77		Amended complaint of Louis Bergament filed. (18
1-21-77		Sten. transcript dtd 9-3-76 filed. (18
1-21-77		As per stip filed in 75 C 684 (see copy in that file), Doc. #113, 171, 176, and 186 certified and handed to Jerry Congress for deliv to C of A.
1-24-77		Acknowledgment rec'd from C of A for receipt of documents as desecribed above re: 75 C 684 & filed in 75 C 684. ==
1/31/77		Copy of letter of Breed, Abbott & Morgan to Platt, J dtd 1/28/77 f re copy of Platt's, J letter attached to memo granting permission the continuation of the deposition etc. (
2-1-77		Notice of cont'd deposition of Raymond T. Andersen filed. (1
2-1-77		Notice to depose Gilbert Michalsky filed. (1

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Notice of Appeal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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A 19

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION

MDL #196

----------x

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,

Plaintiff,

75-C-684

-and-

NOTICE OF APPEAL

LOUIS PERGAMENT,

Intervenor-Plaintiff,

-against-

ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO,

Defendants.

----------x

NOTICE IS HEREBY GIVEN that plaintiff Robert Gold, on behalf of himself and on behalf of all others similarly situated, and intervenor-plaintiff, Louis Pergament, hereby appeal to the United States Court of Appeals for the Second Circuit from the Order Certifying Class and Designating Manner and Time of Notice dated and entered November 30, 1976, the Supplemental Order dated and entered November 30, 1976 and the Order dated and entered October 27, 1976, insofar as such Orders require that plaintiffs as class representatives bear the costs and expenses of identifying beneficial owners of Franklin New York Corporation securities registered in nominee name or street name.

Attached hereto as Exhibit A are the names and addresses of the attorneys of record for each party to Gold, et al. v. Ernst & Ernst et al., and attached hereto as Exhibit B are the names and addresses of the parties of record to Multidistrict Litigation #196.

DATED: New York, New York
December 9, 1976

MILBERG & WEISS

By _____
A Member of the Firm
Attorneys for Plaintiff Gold
and Liaison Attorneys for
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Amended Complaint of Plaintiff Gold

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 21

In Re

FRANKLIN NATIONAL BANK SECURITIES LITIGATION

M.D.L. #196 (O.G.J.)

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated

Plaintiff,

-versus-

ERNST & ERNST
HAROLD V. GLEASON
PAUL LUFTIG
PETER F. SHADDICK
MICHELE SINDONA
CARLO BORDONI
HOWARD D. CROSSE
ANDREW N. GAROFALO
DONALD H. EMRICH
ROBERT C. PANEPINTO

Defendants.

75-C-604

AMENDED COMPLAINT

CLASS ACTION

JURY TRIAL DEMANDED

Plaintiff, for his complaint herein, alleges all on information and belief, except for the allegations of Paragraph "6".

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action under Section 27 of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. §78aa and the principles of pendent jurisdiction.

2. Plaintiff brings this action pursuant to Section 10(b) of the 1934 Act, 15 U.S.C. §78j(b) and Rule 10b-5 promulgated thereunder.

3. Many of the acts and effects thereof complained of herein occurred within this district; such acts included practices and conduct violative of the 1934 Act and the mailing of financial statements into this district.

4. In connection with the acts, conduct and other wrongs complained of herein, the defendants, directly and indirectly, used means and instrumentalities of interstate commerce and the mails.

GENERAL MATTERS

5. (a) Franklin New York Corporation ("Franklin"), not a defendant herein, whose principal office is located at 450 Park Avenue, New York, New York 10022, was a bank holding company registered under the Bank Holding Act of 1956, as amended. Franklin was incorporated in the State of New York in 1965. On October 16, 1974, as a result of the acts and conduct described below, Franklin filed a petition (Bankruptcy No. 74B 1428) for voluntary bankruptcy in the United States District Court, Southern District of New York. Trading in Franklin's common and preferred stock was suspended by the Securities and Exchange Commission ("SEC") on or about May 13, 1974, and trading in its capital notes was suspended on or about May 16, 1974. Until October 8, 1974, the only significant operations of Franklin were conducted through Franklin National Bank ("FNB") and its subsidiaries, and FNB was Franklin's primary source of income. Franklin's financial statements were consolidated with and included the earnings and assets of FNB.

(b) Franklin owns substantially all of the voting capital stock of FNB and is a controlling person of FNB within the meaning of Section 20(a) of the 1934 Act. FNB, not a defendant herein, was organized as a national banking association in 1926 under the laws of the United States and maintains its principal place of business in New York, New York. FNB's shares were traded in the over-the-counter market until the SEC suspended them from public trading on about May 13, 1974.

(c) On October 8, 1974, as a result of the acts alleged herein, the Comptroller of the Currency declared FNB insolvent and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for FNB.

PARTIES

6. The plaintiff, Robert Gold, who is a resident of the State of New York, purchased 300 shares of the common stock of Franklin on the open market on May 9, 1974, when the stock was publicly traded on the over-the-counter market.

7. Defendant Ernst & Ernst ("Ernst"), a partnership, is a national Certified Public Accounting firm with one of its principal places of business in New York City. Ernst was the auditor for both Franklin and FNB during the times of the wrongs alleged herein, and examined and rendered unqualified opinions with respect to Franklin and FNB financial statements included in the annual reports of Franklin and FNB for the years ended December 31, 1972 and December 31, 1973, and in Forms 10-K filed by Franklin and FNB with respect to the aforementioned fiscal years.

8. The following individual defendants (sometimes hereinafter referred to as "individual defendants") held the following positions with Franklin or FNB at various times material to the transactions involved herein.

HAROLD V. GLEASON ("Gleason")	Chairman of the Board and Chief Executive Officer of both Franklin and FNB; Director of both Franklin and FNB
PAUL LUFTIG ("Luftig")	President, Principal Administrative Officer and Director of both Franklin and FNB.
PETER R. SHADDICK ("Shaddick")	Senior Executive Vice-President of both Franklin and FNB until October 1973, and thereafter Executive Vice Chairman of both, Director of Franklin since January, 1973.

MICHELLE SINDONA ("Sindona")	Director of Franklin, Chairman of Franklin's International Executive Committee; owner of substantially all the shares of FASCO International Holding, S.A. ("FASCO"), a Luxembourg Corporation holding approximately 21.6 of Franklin's outstanding common shares and 18.3% of all Franklin's outstanding voting securities.
CARLO BORDINI ("Bordini")	Director of Franklin and member of Franklin's International Executive Committee; in addition, a Director of FASCO.
HOWARD D. CROSSE ("Crosse")	Vice-Chairman and Director of both Franklin and FNB; in charge of FNB's Resources Management Function.
ANDREW N. GAROFALO ("Garofalo")	Assistant Vice-President of the International Division of FNB until December, 1973, and thereafter, Vice-President thereof; Head Trader in FNB's foreign exchange department.
DONALD H. EMRICH ("Emrich")	Assistant Manager in the International Division of FNB from July, 1973 to January, 1974, and thereafter, Assistant Cashier; Trader in FNB's foreign exchange department.
ROBERT C. PANEPINTO ("Panepinto")	Senior Auditing Clerk in the International Division of FNB from June 1973 to September 1973, Supervisor from September 1973 through January, 1974, and Audit Supervisor of International Banking thereafter.

The Director-defendants were at all times controlling persons within the meaning of Section 20(a) of the 1934 Act and are jointly and severally liable for the violations described hereinafter of Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder.

CLASS ALLEGATIONS

9. Plaintiff sues individually on his own behalf and

representatively on behalf of a class consisting of all persons and entities who bought Franklin securities on the open market commencing with January 17, 1973 through May 16, 1974 ("class period") and who sustained damage as a result of making such purchases.

10. During the class period Franklin had in excess of 20,000 security holders who were located throughout the country and Franklin's securities were actively traded in the over-the-counter market nationally. The class is so numerous that joinder of all of its members would be impracticable.

11. Plaintiff is an adequate representative of the class because he has sustained damages and has the same interest as all of the members of the class; his claims are typical of the claims of the members of the class and he and his counsel will fairly and adequately protect the interest of the class.

12. There are questions of law and fact common to the class, which predominate over any questions solely affecting individual members of the class. Among such questions of law and fact are: Whether defendants participated in, conspired in or aided and abetted the continuous dissemination of false and misleading statements to members of the class; whether defendants omitted to state material facts necessary to make other statements issued not misleading; the materiality and market impact of the financial statements, filings and press releases issued by defendants; the duty owed by the defendants to members of the class and the defendants' resulting liability and the measure of damages.

13. Class action is superior to other available measures for the fair and efficient adjudication of the controversy.

COUNT I (SECTION 10(b) 1934 ACT)

14. Beginning in or about January 1973 and continuing through May 1974, defendants directly and indirectly, singly or in concert, and aiding and abetting one another, and by use of the mails and other instrumentalities of interstate commerce, engaged in an unlawful combination and conspiracy, pursuant to which defendants commenced and continued a course of conduct to artifically inflate and maintain the market prices of Franklin securities, and pursuant thereto, employed devices, schemes or artifices to defraud, made untrue statements of material fact and omitted to state other material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and engaged in acts, practices and courses of business which would and did operate as fraud or deceit, all in violation of Section 10(b) of the 1934 Act and Rule 10b-5, promulgated thereunder, more particularly by issuing or participating in the issuance, or aiding and abetting the issuance of the reports described below:

(a) Franklin's and FNB's annual reports for the fiscal years ended December 31, 1972 and 1973, their quarterly reports for the first, second and third quarters of 1973. and the press release dated April 18, 1974 issued in lieu of a report for the first quarter of 1974 (all of which reports presented consolidated financial statements for Franklin and FNB) together with other reports and press releases published by Franklin and FNB during the class period, were materially misleading in at least the following respects:

(i) Going Concern Problem

(A) Such reports failed to disclose pervasive uncertainty concerning Franklin's ability to survive as a going concern and thus violated generally accepted accounting principles and generally accepted auditing standards which provide that one basic premise underlying financial reports is that the company reported upon will continue in business as a going concern unless otherwise stated. The company's prospect of survival is vitally important to prospective investors in making intelligent investment decisions. In addition, treatment of Franklin as a going concern overvalued substantial assets which would have little or no value if Franklin did not profitably continue in business. For instance, Franklin's annual reports for 1972 and 1973 reported as assets certain tax loss carry forwards, which would have no value unless Franklin continued as a going concern. The overvaluation of such accounts resulting from the going concern problem are described in further detail below in ¶14(iv). In addition, Franklin carried certain securities on its books at cost rather than market. However, such treatment is improper for a company which does not have a reasonable certainty of survival, for the valuation at cost is premised upon the company's survival for a long enough period to allow a reasonable opportunity to recoup temporary market losses. The overvaluation of such investment account securities is described in detail in ¶14(vii) below.

(B) Among the indicia of Franklin's going concern problem which were known to defendants were the following:

By December, 1972, FNB and Franklin were unprofitable on an operating basis. In addition, overexpansion of its loan portfolio had resulted in a loan portfolio whose quality had been criticized from as early as mid 1971 by the National Bank Examiner ("the Examiner") who, pursuant to the authority granted the Comptroller of the Currency, had responsibility for the Franklin and FNB accounts. Franklin's overexpansion of its loan portfolio had created a need to borrow large sums of money upon which its interest expense was so great as to allow little or no operating profit on the loan portfolio. Moreover, the funds borrowed by Franklin to support its loan portfolio were short term funds which could be withdrawn upon short notice, thus creating a potentially disastrous liquidity problem.

(C) Accordingly, FNB's and Franklin's financial statements for 1972 violated generally accepted accounting principles and the accompanying auditors opinion of Ernst violated generally accepted auditing standards in treating Franklin and FNB as going concerns.

(D) Subsequent to the issuance of the 1972 Annual Report, Franklin's "going concern" problem worsened. While its reported "total resources" grew by 29% between December, 1972 and November, 1973, the bank's capital increased less than .5% and demand and savings deposits had declined. The Comments on Matters Requiring Attention of the Examiner having responsibility for Franklin and FNB dated November 14, 1973 stated that the bank was badly undercapitalized and that

> "The bank's continued use of heavy borrowings, particularly in the Federal Funds market, to support an extremely overloaned position is a matter of utmost concern ... In view of the extremely heavy borrowing record in the past year

> it can only be concluded that this method is being utilized in an attempt to improve earnings. The financing of long term credits by short term borrowings is an extremely dangerous course for any bank to follow and the overall situation should be the subject of a thorough review. It is imperative that the Directorate and senior management give immediate consideration to the soundness of this borrowing program in view of the bank's low liquidity position, weak capitalization, and the serious problems that exist in the loan portfolio."

All defendants knew or were on notice of the Examiner's comments. Nonetheless, FNB's and Franklin's financial statements for the year ended December 31, 1973 improperly treated FNB and Franklin as going concerns without disclosure of such pervasive uncertainties, thus violating generally accepted accounting principles and generally accepted auditing standards and overvaluing the assets whose stated value rested upon a presumption of a going concern as aforesaid.

(E) In order to conceal the fact that FNB was unprofitable on an operating basis and FNB's serious going concern problems, defendants wrongfully engaged in the misrepresentations, materially misleading omissions and highly risky foreign exchange speculations described in the following subparagraphs.

(ii) Loan Loss Reserves

(A) Throughout the class period, defendants wrongfully inflated Franklin's income and assets by failing to set forth a sufficient reserve for loan losses. The quality of Franklin's loan portfolio had been strongly criticized by the Examiner at least since mid-1971, when the aggregate of "Loans Subject to Classification" (the Examiner's term for "problem loans") was characterized as "untenable" by the Examiner because they aggregated 49% of the

gross capital funds. On December 11, 1972, the Examiner noted "the intolerable high volume of loans subject to adverse comment," with criticized assets up to 74% of gross capital funds and noted that "heavy losses sustained in recent years, and the further potential losses reflected by the substantial Doubtful aggregate are a matter of serious concern. Strong corrective measures must be taken to improve the unsatisfactory condition of the loan portfolio." On November 14, 1973, the Examiner commented:

> "There has been a marked deterioration in the quality of the loan portfolio since the last examination...[T]he aggregate [of criticized assets] involved represents an alarming 111% of Gross Capital Funds versus 82% at the last examination. The matter of the serious loss problems related to the rapid expansion of the loan account in recent years and the potential losses represented by the substantial doubtful aggregate are matters of great concern. Another very disturbing factor is that the bulk of the $135 million of loans subject to initial criticism at this examination are relatively new credits which further magnifies the problem involved. It is obvious that the accumulation of such a large volume of unsatisfactory paper between examinations is due to the fact that established lending policies have not been adhered to. It is the responsibility of the Directorate and senior management to adopt the required corrective measures that will be effective in bringing about improvement in the highly unsatisfactory condition existing in the loan portfolio."
> (Emphasis added)

(B) Despite the highly unsatisfactory condition of Franklin's loan portfolio throughout the class period, defendants recklessly failed to set forth an adequate reserve for loan losses in the annual and interim reports referred to above and in other reports and releases during the class period, thereby artificially inflating Franklin's and

FNB's income and loans receivable throughout the class period. In determining the loan loss reserves during the class period, defendants followed an inappropriate procedure which involved use of a minimum charge to operating expenses based upon a five year average ratio of net charge-offs to total loans. Such procedure can not correctly value a loan portfolio whose quality is rapidly deteriorating without an adjustment to reflect the actual condition of the loan portfolio. Such adjustment is required for fair reporting. Defendants recklessly failed to make the adjustment necessary to increase the loan loss reserves by the amount necessary to reflect the actual condition of the loan portfolio.

(C) The valuation portions of the Reserve for Possible Loan Losses (the portion of the loan loss reserve available for a charge against earnings) and the category of Provision for Loan Losses, (a charge against income) were insufficient in the Annual Report for 1972 by at least $10,685,000, inflating loans receivable by at least that amount and thereby inflating income by an amount almost equivalent to Franklin's net income applicable to common stock of $11,217,000 for 1972. Franklin's Reserves for Possible Loan Losses in its 1973 first, second and third quarter reports were similarly understated by amounts in excess of $10 million. The valuation portion of Franklin's Reserve for Possible Loan Losses and its Provision for Loan Losses in its 1973 Annual Report were insufficient by a minimum of $17.7 million and of $15.3 million, respectively, amounts substantially in excess of the figure for net income applicable to common stock reported for such period of only $10.804 million. The valuation portion of the reserve was

improperly reduced from $10.1 million as of December 31, 1972 to $10 million as of December 31, 1973, despite an increase in the amount of loans designated by the Comptroller of the Currency as "doubtful" loans from approximately $16,380,000 to approximately $32,371,000 and despite an increase in the size of Franklin's loan portfolio from $2.079 billion to $2.87 billion. The April 18, 1974 release issued in lieu of a first quarter report set forth a Reserve for Possible Loan Losses which was understated by substantially more than $17.7 million, and the May 10 and 12, 1974 press release failed to disclose such inflation of income and loan loss prospects. Such omissions and misrepresentations thus inflated income in amounts which entirely masked the bank's unprofitability.

(D) In addition, such reports failed to disclose severe inadequacies in the Franklin's and FNB's credit review system and internal controls with respect thereto which had been criticized by the National Bank Examiner. The inadequacies severely impaired Franklin's ability to operate on a profitable basis.

(E) Such reports also failed to disclose various improper and improvident loans made by FNB to persons and entities associated or affiliated with, or controlled by, officers or directors of FNB and/or Franklin.

(iii) Foreign Exchange

(A) None of the reports or releases revealed that throughout the class period FNB speculated heavily in high risk foreign exchange in an effort to provide a source of profits to compensate for the absence of profits in the remainder of the bank's operations. Heavy foreign exchange speculation began before 1973, with total purchases and sales contracts amounting to $1.375 billion as of December 11, 1972 (a 313% increase since the last examination by the Comptroller

of the Currency). By November 14, 1973, the bank had $3.8 billion outstanding in contracts to buy or sell foreign currency at a future date, a substantial proportion of Franklin and FNB's $5.6 billion of total resources at year end 1973 and many times shareholders' equity. Despite the fact that the risk inherent in such speculation contravenes the average investor's concept of the nature of banking income, defendants wrongfully failed in the reports issued during the class period to set forth properly the proportion of Franklin's net income represented by apparent foreign exchange earnings, to reveal that foreign exchange activity was designed to compensate for FNB's operating problems, or to reveal the full extent of the bank's commitment of its assets to foreign exchange speculation. None of the Franklin reports specified the amount of earnings attributed to foreign exchange transactions until the Annual Report for 1973. It and subsequent reports failed to focus sufficient attention on the extent of the bank's dependence on foreign exchange earnings in order to report income. Moreover, all such reports wrongly failed to disclose the high-risk nature of the foreign exchange transactions involved, despite actual notice from the Examiner cautioning management "on the inherent risks of large open positions and gaps, particularly in this period of wide currency fluctuations."

(B) All such reports also failed to reveal significant internal control problems which FNB was experiencing in its foreign exchange departments and which had been designated by the Examiner as problems in the foreign exchange area prior to the class period in communications with defendants, including, inter alia, the lack of a system to assure verification of

the accuracy of rates assigned to foreign currencies for the purpose of determining unrealized profits and losses on open foreign exchange transactions (which unrealized profits and losses were incorporated within the bank's published income figures throughout the class period.)

(C) Said statements failed to disclose material losses incurred by Franklin and FNB in foreign exchange transactions, and failed to disclose that reported profits reflected the results of numerous non-arms length foreign exchange transactions, which were designed solely to generate sham profits in a material amount and to conceal material foreign exchange losses. Many of these transactions were arranged between Franklin or FNB and foreign banks directly or indirectly owned or controlled by Sindona and Bordoni such as Bank Amincor A.G. and Bank Unione S.P.A., to give Franklin and FNB the illusion of profitability, to allow Franklin to continue its payment of dividends, and to artificially inflate the market price of Franklin securities. Failures to report the foreign exchange losses, with resultant inflation of income, include, but are not limited to, the following:

(1) The 1973 First Quarter Report: concealment of $1.688 million foreign exchange loss, representing over 50% of net income applicable to common stock;

(2) 1973 Second Quarter Report: concealment of $5.613 million foreign exchange loss, almost equal to net income applicable to common stock of $5.628 million;

(3) 1973 Third Quarter Report: concealment

of $4 million foreign exchange loss, an amount in excess of net income applicable to common stock of $1.610 million;

(4) 1973 Annual Report failed to disclose the above described and other losses and concealments, instead reporting Foreign Exchange Trading Income of $7.754 million;

(5) The release issued on April 18, 1974 issued in lieu of a first quarter report for 1974 failed to reveal a $33.015 million loss and instead reported net income applicable to common stock of $79,000.00.

(D) Further, when some of the foreign exchange losses were ultimately disclosed on May 12, 1974, Franklin and FNB falsely stated that a substantial portion of the loss would be covered by insurance and omitted to state that some of said losses were applicable to prior periods.

(iv) Anticipated Tax Benefits From Deferred Taxes

In all the annual and interim reports, defendants wrongfully reported as an asset anticipated tax benefits representing tax loss carry forwards despite the probable failure of Franklin or FNB to earn future income which could benefit from such potential tax deductions. In August 1974, when Franklin publicly recognized the impropriety of carrying such items as assets, it charged against earnings $7.873 million in deferred taxes, $3.5 million of which represented the illusory prospective benefit of tax loss carry forwards expiring in 1974, 1975 and 1976, and $4.4 million arising from sale and leaseback transactions. All of such items were reported as

assets during the class period.

(v) Improper Valuation of Trading Account Securities

The annual and interim reports failed to disclose that trading account income and the investment accounts were overstated by millions of dollars because of misvaluation in the improper transfer of securities between FNB's trading and investment accounts, and the improper valuation of securities held in FNB's trading account. The misvaluations were accomplished through the following devices:

(A) Said reports failed to disclose that Franklin and/or FNB wrongfully delayed recording whether certain purchases and sales of securities were made with respect to its investment accounts, or with respect to trading accounts. Trading account securities were required to be stated at market value on financial statements. Investment accounts were stated at cost. Franklin wrongfully delayed recording the account for which trades were made, so that when said securities declined in market value, it could attribute said securities to the investment account rather than the trading account. By this artifice, Franklin and FNB reported said securities at cost so as to hide subsequent losses incurred thereon.

(B) Defendants valued securities as of dates other than the actual date of transfer from the trading to the investment account. They utilized dates on which the market prices of such securities were higher than when actually transferred so that subsequent losses would not be reflected in the trading account. This scheme was designed to and did subvert and take advantage of defendants' practice of valuing at cost, so as to avoid reporting unrealized "paper" losses.

On one such occasion, $100,000,000 of U .S. Treasury bills were transferred from the trading to the investment account on March 28, 1974, but valued at their market price as of March 11, 1964, resulting in a $2.3 million inflation of trading account income and of the investment portfolio.

(C) In addition, defendants failed to adjust the value of certain securities in FNB's trading accounts to current market prices, which were lower than the prices at which said securities were stated. Thus $17.245 million of municipal bonds and $10.31 million of corporate bonds in the trading account were misvalued at March 31, 1974 by carrying them at cost despite a loss in market values of $1.189 million.

(D) On various occasions prior to and during the class period, transfers from trading to investment portfolios were made at cost when the market price of the security was substantially lower than cost, thus causing inflation of trading account income and misvaluation of the investment portfolio. At least one such transfer occurred in 1972, and at least 9 additional such transfers occurred during the first, third and fourth quarters of 1973. As a result of the 1973 transfers, 1973 year-end trading account profits were overstated by a minimum of $1.5 million. In addition, $26 million of U.S. Treasury bills and $35.75 million of U.S. Government agency bonds were transferred from the trading to the investment account at cost on March 28, 1974, thereby concealing a loss on such securities of $2.2 million. All of the aforementioned devices to misvalue securities were designed to and did conceal material trading losses throughout the class period, including at least $1.5 million in 1973, and over $5,700,000.00 of trading losses in the first quarter of fiscal 1974.

(E) The reports failed to reveal significant problems of internal control and the lack of reliable accounting records within the trading account department which rendered it difficult or impossible for such department to be managed profitability and which rendered publicly issued reports containing results of its operations inherently unreliable.

(vi) The "Crediop" Transactions

The annual report for 1973, and the April 18, 1974 release failed to disclose that

(A) In 1973, FNB, at Sindona's direction, joined with a number of other banks and financial institutions in underwriting a $1 billion issue of eight-year notes of Consorizio Di Credito Per Le Opere Publiche ("Crediop"), an Italian governmental body. FNB's participation was $200,000,000 the largest underwriting participation ever undertaken by FNB;

(B) FNB was able to legally purchase only $5,000,000 of notes for its own account because of federal legal lending limits and a previous loan to Crediop;

(C) Sindona had secretly agreed to assume any unsold portion of FNB's participation. In January 1974, FNB found itself unable to sell $96,500,000 of its commitment; and

(D) When FNB was unable to sell $96.5 million of its participation, it was required to deposit $96.5 million in Edilcentro International Ltd., a foreign financial institution capitalized at approximately $1 million, whose Managing Director was Bordoni, so that Edilcentro could fulfill Sindona's commitment to assume such unsold portion. The statements also failed to disclose the substantial risk to which Franklin and FNB were thereby exposed.

(vii) Wrongful Reporting of Investment Securities at Cost

The annual and interim reports improperly reported investment account securities at cost, when their market value was substantially lower than cost. Thus investment securities were listed at year end 1972 at cost at approximately $495 million, which was more than $45 million in excess of the market value of such securities. During 1973, the gap between market value of Franklin's investment securities and their cost increased to approximately $140 million, virtually eliminating shareholders' equity as of December 31, 1973. The annual reports to shareholders failed to reveal the significance of such disparity, and the interim reports failed to disclose such disparity at all. Because of pervasive uncertainty as to Franklin's ability to continue as a going concern, and its marginal or nonexistent net income during the periods described, such reporting was materially misleading and violated generally accepted accounting principles and principles of fair reporting.

(viii) Misvaluation of Sterling Currency Contracts

The annual and interim reports, particularly the quarterly report for the third fiscal quarter of 1973, overstated the value of sterling currency contracts held by FNB by at least $1.3 million.

(b) As a result of the foregoing omissions and misstatements, the annual and interim reports materially overstated the income, assets and prospects of Franklin and FNB.

15. Ernst issued unqualified opinions with respect to the financial statements of Franklin and FNB described above for the years ending December 31, 1972 and December 31, 1973, respectively, and the interim reports were prepared and disseminated with Ernst's approval and in accordance with principles and practices approved by Ernst. Ernst's opinions stated

that the annual report statements fairly presented Franklin's and FNB's financial position and operating results in conformity with generally accepted accounting principles, and that Ernst's audit had been conducted in accordance with generally accepted auditing standards. However, said statements were not in conformity with generally accepted accounting principles or standards of fair reporting; Ernst's audit was not conducted in accordance with generally accepted auditing standards; and Ernst's opinions as to the year end financial reports and its participation with respect to interim reports was improper in at least the following respects:

(A) At all times during the class period, Ernst knew or should have known of each of the problems described above in Paragraph 14. Ernst knew or had notice of the Examiner's comments described above, and knew or should have known the facts described in Paragraph 14 from its year end audits and its continuing consultations and conferences with officers, directors, and other personnel of Franklin and FNB. Nevertheless Ernst failed to qualify its opinions for the 1972 and 1973 FNB and Franklin financial statements included in the annual reports and participated in or aided and abetted the issuance of the interim reports.

(B) Examples of Ernst's knowing participation in the misrepresentations and materially misleading omissions described in Paragraph 14 include, but are not limited to:

(i) Ernst knew that internal control in the foreign exchange area was criticized by the Examiner during 1972; Ernst knew that it was important for persons independent of Franklin's foreign exchange trading department to check and verify the accuracy of rates assigned to currencies when revaluing unrealized foreign exchange profits and losses.

Despite the fact that Ernst was retained by Franklin to A 41 evaluate the adequacy of foreign exchange internal controls during 1972 and 1973 Ernst recklessly failed to take proper steps to assure that such independent verification of rates assigned to foreign exchange transactions was in fact occurring, and recklessly reported that independent confirmation of rates was occurring when in fact it was not. In addition, Ernst in performing its audit of Franklin's financials for 1973, itself recklessly failed to check and verify the accuracy of rates assigned to foreign currencies for the purpose of evaluating unrealized foreign exchange profits and losses, and recklessly ignored data which showed that numerous "wash" transactions occurred in 1973 and that improper rates were assigned to currencies on foreign exchange transactions throughout 1973 and into 1974. Such verification, which was required to conform with generally accepted audit standards would have revealed the inadequate internal control and material foreign exchange losses and sham profits.

(ii) With respect to the "going concern" problem and the wrongful reporting of anticipated benefits from deferred taxes and investment securities at cost, Ernst's supervisor of the Franklin account recognized in December 1972 that the bank was unprofitable on an operating basis, questioned whether Franklin was reasonably assured of future operating profits, and questioned the correctness in such context of reporting anticipated benefits from deferred taxes as assets. Nevertheless, throughout the class period, Ernst disregarded this and other actual notice of Franklin's questionable ability to survive, and failed to qualify its opinion to reveal that the continuation of Franklin as a profitable organization and as a going concern was not reasonably assured.

It also failed to qualify its opinion to disclose the questionable value of anticipated tax benefits reported as assets and the valuation of investment account securities at cost.

(iii) Ernst improperly failed to insist upon the establishment of adequate reserves, and in the absence thereof to qualify its opinions with respect to the 1972 and 1973 financial statements, despite the deficiencies in the reserves for loan losses specified in ¶14(a) (iii), which deficiencies were or should have been known to Ernst. Ernst had access to and was required to inquire into the Examiner's reports referred to above. In addition, it had actual knowledge of the quality of the loan portfolio, and was aware of the increasing deterioration of said loan portfolios by virtue of its regular examinations thereof in 1972 and 1973, and an additional special review of the loan portfolio in 1973. In addition, Ernst had been informed by Raymond Anderson, a Franklin officer hired specificially to improve the loan portfolio, that the loan loss reserve subsequently certified by Ernst at year end 1973 was inadequate. Further, Ernst also knew that Franklin's loan reserves as a percentage of outstanding loans, were materially smaller than reserves of other banks which had loans of better quality.

(iv) The $2.3 million misvaluation of trading account securities resulting from a transfer on March 28, 1974 at a market price as of March 11, 1974 was specifically reviewed and approved by Ernst prior to its effectuation. Moreover, in late 1973 and 1974, senior management recognized and informed Ernst of severe inadequacies in internal controls and the unreliable accounting system within the trading account department and informed Ernst of their reliance on Ernst to confirm the

accuracy of all published trading account figures.

16. The issuance of some or all of the aforesaid financial staements and reports was caused by or aided and abetted by each of the defendants.

17. All defendants knew, were on notice of, or recklessly disregarded facts indicating that the financial statements and reports described above contained untrue statements of material fact and omitted to state material facts necessary in order to make the statements in the light of circumstances under which they were made not misleading.

18. Plaintiff and the members of the class purchased their securities relying on the integrity of the financial statements described above, upon the integrity of the market in which Franklin securities traded, and upon the integrity of the artificially inflated and maintained market prices of Franklin securities generated by the false and misleading statements and pronouncements described above. They sustained substantial damages as a result thereof, either by sale of their securities, or by continuing to hold them at their reduced value.

COUNT II COMMON LAW

19. Plaintiff repeats and incorporates the allegations of paragraphs 1 through 18.

20. The acts and transactions alleged in paragraphs 1 through 17 hereinabove constitute violation of common law fraud.

21. The allegations of this amended complaint, except for the allegations of paragraph 6, are made upon information and belief. The facts are primarily within the exclusive possession of defendants, of the Federal Deposit Insurance

Corporation as Receiver of FNB and of Sol Neil Corbin as Trustee in Bankruptcy of Franklin. The sources of plaintiff's information and belief are investigations made by his attorneys, including limited examination of documents of Ernst and other defendants in this action and in the other actions in this multidistrict litigation, certain documents received by the Securities and Exchange Commission from such defendants, deposition testimony by such defendants before the Securities and Exchange Commission, and the guilty plea of defendant, Peter Shaddick in the action of United States v. Bordoni, et al. currently pending in the United States District Court for the Southern District of New York.

WHEREFORE, plaintiff demands judgment:

A. Determining that the instant action is a proper class action maintainable under Rule 23 of the Federal Rules of Civil Procedure;

B. In favor of the plaintiff and the class for all damages sustained by them;

C. For the costs of this suit, including reasonable attorneys' and accountants' fees and expenses;

D. For such other and further relief as may be just and proper.

Dated: January 15, 1976

MILBERG & WEISS

By _____
A Member of the Firm
Attorneys for Plaintiff
One Pennsylvania Plaza
New York, New York 10001
(212) 594-5300

Plaintiffs' Notice of Settlement of Order dated August 19, 1976, together with the Attached Proposed Order (including proposed form of Notice of Pendency)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, et al., Defendants.	75-C-684 NOTICE OF SETTLEMENT OF ORDER

PLEASE TAKE NOTICE, that the following Order will be presented for settlement to the Honorable Thomas C. Platt at 11:30 a.m.on September 3, 1976, at the United States District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York.

Dated: New York, New York
August 19, 1976

MILBERG & WEISS

By _____
A Member of the Firm

Liaison Attorneys for Plaintiffs
and Attorneys for Plaintiff Gold
One Pennsylvania Plaza
New York, New York 10001
(212) 594-5300

TO: ALL COUNSEL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, et al., Defendants.	75-C-684 ORDER CERTIFYING CLASS AND DESIGNATING MANNER AND TIME OF NOTICE

WHEREAS, plaintiff Gold moved by notice of motion dated November 26, 1974, together with an accompanying affidavit of Melvyn I. Weiss and a memorandum of law, for an order certifying that the action of Gold v. Ernst & Ernst, et al. proceed as a class action; certain defendants filed memoranda in opposition to such motion dated June 19, 1975, July 11, 1975, December 18, 1975, and February 5, 1975; plaintiff Gold further filed affidavits of Jared Specthrie (sworn to July 3, 1975) and of Melvyn I. Weiss (sworn to January 22, 1976), and a Response to Defendants' Sur-Reply Memorandum with Respect to Class Motion, and a Memorandum of Law dated July 3, 1975 in support of the motion; plaintiffs Gold, Mendes and Pergament filed a further memorandum in support of the aforesaid motion dated January 22, 1976; plaintiff Bookstein submitted an affidavit of Robert Kornreich in support of the motion sworn to January 21, 1976; plaintiffs, Gold, Mendes and Pergament filed Answers and Objections to Defendants' Class Action Interrogatories and

plaintiff Gold filed an amended complaint on January 15, 1976;

AND WHEREAS, after due deliberation thereon, the Court determined in its Memorandum and Findings dated April 5, 1976 that class certification in the Gold action was proper and that the class should consist of all purchasers of common stock, preferred stock or capital notes of Franklin New York Corporation who "gave their orders for purchase" between July 16, 1973 and May 16, 1974 and directed plaintiff Gold to submit an Order determining the class as set forth in such Memorandum and Findings and specifying the time and manner of giving notice to the class;

AND WHEREAS, upon further consideration, it appears that the class is more properly defined to consist of all persons who purchased the above designated securities between the above designated dates (rather than those who gave "orders for purchase" between such dates) in light of mechanical difficulties inherent in the task of determining when the order for purchase was given;

NOW, THEREFORE, IT IS ORDERED, THAT:

1. The action of Gold v. Ernst & Ernst, et al. will proceed as a class action on behalf of all purchasers of common stock, preferred stock, or capital notes of Franklin New York Corporation who purchased any of such securities between July 16, 1973 and May 16, 1974.

2. Plaintiff Gold, intervenor plaintiff Pergament, and plaintiff Mendes of Mendes v. Sindona, et al., are hereby designated as class representatives in the Gold action.

3. The form of notice attached hereto as Exhibit A ("the Notice") is the best Notice practicable under the circumstances to be sent to the members of the class. The Notice is in compliance with Rule 23(c)(2) of the Federal Rules of Civil Procedure.

4. Milberg & Weiss, liaison counsel for the class, be and hereby are designated to carry out the Notice program hereinafter set forth.

5. Milberg & Weiss shall expeditiously take such steps as may be necessary to obtain lists of the names and last known addresses of the class members defined herein in accordance with the provisions of this Order. Any persons who may have books or records containing the names and addresses of the class members or their nominees shall cooperate with Milberg & Weiss and make available to such counsel any and all such lists or other material for inspection and copying. Any such material within the possession, custody, or control of Sol Neil Corbin as trustee in bankruptcy of the Franklin New York Corporation, including lists or other material in the possession of any transfer agents of the Franklin New York Corporation, shall be furnished to Milberg & Weiss on or before September 30, 1976.

6. On or before October 30, 1976, Milberg & Weiss shall cause a copy of the Notice to be mailed by first class mail to members of the class or their nominees, at their last known addresses as they appear on the books and records of the Franklin New York Corporation and/or the records of the transfer agent of Franklin New York Corporation and/or the trustee in bankruptcy of the Franklin New York Corporation.

7. Milberg & Weiss shall promptly rent a numbered Post Office Box in the City of New York, New York, in the name of the Clerk of the Court for the purpose of receiving communications and inquiries regarding Notice of this class action, and exclusion requests. All Notices to class members shall bear the caption of the consolidated litigation herein and of the Gold action, shall be sent in the name of the Clerk of the Court, and shall bear the designation of said Post Office Box as the return address.

8. On or before November 10, 1976, plaintiff Gold shall file in the Court proof by affidavit of the mailing of the Notice in compliance with this Order.

9. The Notice shall provide that any request for exclusion be postmarked on or before thirty (30) days from the date of the mailing of the Notice. Plaintiff Gold shall file with the Clerk of the Court and make available to defendants all requests for exclusion as they are received from members of the class in response to the Notice.

10. All costs and expenses incurred incident to the preparation and mailing of the Notice as set forth herein shall be borne by the class representatives subject to further Order of the Court.

Dated: Brooklyn, New York
, 1976

SO ORDERED:

_____
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE	
FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff,	74-C-684
- and -	
LOUIS PERGAMENT, Intervenor-Plaintiff,	
- against -	
ERNST & ERNST, et al., Defendants.	

TO: ALL PURCHASERS OF THE SECURITIES OF FRANKLIN NEW YORK CORPORATION (COMMON STOCK, PREFERRED STOCK, AND CAPITAL NOTES) WHO PURCHASED BETWEEN JULY 16, 1973 AND MAY 16, 1974.

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, you are hereby notified:

1. There is pending in this Court an action entitled Gold v. Ernst & Ernst, et al., Civil Action No. 75-C-684 (hereinafter "the Gold action") brought on behalf of persons or entities who purchased securities, debt or equity, of Franklin New York Corporation ("Franklin") during the period between July 16, 1973 and May 16, 1974. The Gold action seeks to recover damages sustained by such purchasers as a result of alleged violations by the defendants of the federal securities laws (Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder) and the common law. The claims arise out of alleged failures

by defendants to properly disclose material facts concerning the results of operations and the economic condition of Franklin's subsidiary the Franklin National Bank ("FNB").

2. The pleadings in the Gold action are available for review at the offices of the Clerk of the Court. Plaintiffs generally contend that materially misleading representations and omissions occurred in various documents including Franklin's annual reports to shareholders for 1972 and 1973 and Franklin's interim reports to shareholders for the first three quarters of 1973 and first quarter of 1974. The misrepresentations and omissions alleged include, but are not limited to: (a) failure to disclose pervasive uncertainty concerning FNB's ability to survive as a going concern; (b) wrongful inflation of FNB's income and assets by failing to set forth a sufficient reserve for loan losses; (c) failure to reveal the importance to FNB's operations of excessive and improper speculation in high risk foreign exchange transactions; (d) failure to reveal inadequate internal control of foreign exchange trading activities and the existence of numerous activities designed to conceal material foreign exchange losses; (e) wrongfully reporting as an asset "tax benefits" which had unlikely prospects of being realized; (f) overstatement of trading account income and of the value of investment account securities; and (g) understating of trading account losses.

3. The defendants involved are Franklin's independent accountants (Ernst & Ernst), certain former officers and directors of Franklin and FNB, and certain former employees in the foreign exchange and international divisions of FNB. The defendants have in general denied the claims in the Gold action and have asserted various defenses, cross

claims, and third party claims.

4. Various other actions have been brought concerning the economic collapse of the FNB and liabilities resulting therefrom. A number of such other actions have together with the Gold action been consolidated for pre-trial purposes in the United States District Court for the Eastern District of New York under the title, In Re Franklin National Bank Securities Litigation - M.D.L. #196 (TCP), and the pleadings in such actions are available for review at the office of the Clerk of the Court. The Gold action is the only action in such consolidated litigation which has been certified as a class action by the Court.

5. Pursuant to a Memorandum and Findings dated April 5, 1976 and an Order dated , 1976, this Court has determined that the Gold action is a class action on behalf of all members of the public who purchased Franklin common stock, preferred stock or capital notes between July 16, 1973 and May 16, 1974. Class representatives include Robert Gold, who is the plaintiff in the Gold action; Louis Pergament, who intervened as an additional plaintiff in the Gold action; and Freida Mendes, who is the plaintiff in Mendes v. Sindona, et al., a proceeding also consolidated for pre-trial purposes with the other litigation involving Franklin in this Court. The class representatives seek money damages for themselves and for the class as defined above.

6. As a Member of the Class, you have the option pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure and the Order of this Court to be excluded from

the action if you request such exclusion by mailing a request for exclusion postmarked on or before the day of , 1976, to:

"Clerk, United States District Court
P.O. Box _____
New York, New York 10001"

8. If you request exclusion from the class:

(1) you will be excluded from the class;

(2) you will not be bound by a judgment against the class;

(3) you will not share in a recovery, if any, by the class, by settlement or judgment;

(4) you will not be precluded by reason of your election from prosecuting an individual claim, if timely, regardless of the outcome of the Gold action.

9. Should you wish to be included in the Class as defined in the Gold action, there is no need for you to take any action at this time, and you will continue to be represented by the above named class representatives. Pursuant to Rule 23(c)(2)(C) of the Federal Rules of Civil Procedure, if you do not request exclusion from the Class you may enter an appearance by counsel of your own choice; otherwise you will be represented by counsel for the class representatives. You may also seek leave to intervene as a party in the Gold action.

10. All inquiries regarding the Gold action should be addressed, in writing, to the Court appointed liaison Counsel for the class:

Milberg & Weiss
One Pennsylvania Plaza
New York, New York 10001

11. Banks, brokerage firms, and other institutions holding record title as of any day from July 16, 1973 through and including May 16, 1974 to Franklin securities beneficially owned by others are required to forward this notice to the beneficial owners.

12. Pursuant to Federal Rules of Civil Procedure Rule 23(c)(1), the Court reserves jurisdiction to modify, alter or amend the above described Order maintaining the Gold action as a class action at any time before a final disposition of the matters herein described.

13. This Notice in no way indicates any expression of opinion by the Court as to the merits of the action or the respective claims or defenses, but is merely to advise you of the pendency of the action and your rights above mentioned with respect to it.

Dated: Brooklyn, New York
, 1976

By_____
Clerk

United States District Court

Defendants' Notice of Settlement of Counter Order dated September 2, 1976, together with the attached Affidavit of Barbara Lee, Esq. sworn to September 2, 1976, and Proposed Notice of Pendency of Class Action

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 NOTICE OF SETTLEMENT OF COUNTER ORDER

PLEASE TAKE NOTICE that the within Counter Order will be presented for settlement to the Honorable Thomas C. Platt at 11:30 a.m. on September 3, 1976 at the United States District Court

Eastern District of New York 225 Cadman Plaza East, Brooklyn, New York.

Dated: New York, New York
September 2, 1976

POLETTI FREIDIN PRASHKER FELDMAN & GARTNER

Barbara A. Lee

By_____
Barbara A. Lee
A Member of the Firm
Counsel for Defendant
Howard D. Crosse
1185 Avenue of the Americas
New York, New York 10036
(212) 730-7373

Dewey Ballantine Bushby Palmer & Wood
Attorneys for defendant Gleason
140 Broadway
New York, New York 10005
(212) 344-8000

Battle, Fowler, Lidstone, Jaffin Pierce & Kheel
Attorneys for defendant Luftig
280 Park Avenue
New York, New York 10017
(212) YU6-8330

DiFalco, Field, Lomenzo & O'Rourke
Attorneys for Carlo Bordoni
605 Third Avenue
New York, New York 10016
(212) 986-2434

Davis Polk & Wardwell
Attorneys for defendant Ernst & Ernst
1 Chase Manhattan Plaza
New York, New York 10005
(212) HA2-3400

Mudge, Rose, Guthrie & Alexander
Attorneys for defendant Sindona
20 Broad Street
New York, New York 10005
(212) 422-6767

Rubin Baum Levin Constant & Friedman
Attorneys for third-party defendant Sadlik
645 Fifth Avenue
New York, New York 10022
(212) PL9-2700

TO: ALL COUNSEL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BARBARA A. LEE being duly sworn, deposes and says:

1. I am a member of Poletti Freidin Prashker Feldman & Gartner, attorneys for defendant Howard D. Crosse, and as such am familiar with all of the proceedings and pleadings heretofore had herein. I make this affidavit in partial opposition to the pro-

posed order submitted by plaintiffs certifying the class and designating the manner and time of notice, and in support of the counter order submitted by defendants Crosse, Gleason, Luftig, Bordoni, Sindona and Ernst & Ernst and third-party defendant Sadlik.

2. The counter order, attached hereto, differs from plaintiffs' proposed order only in certain specific language changes which we believe adhere more closely to the provisions of the Memorandum and Findings of Hon. Orrin G. Judd dated April 5, 1976 which define the class. Specifically:

(a) Paragraph 1 of defendants' counter order defines the class in the precise language used by Judge Judd, i.e., purchasers "who gave their orders for purchase" between July 16, 1973 and May 16, 1974. The description of the class in the introductory lines of the proposed Notice has been correspondingly revised, and the WHEREAS clause of plaintiff's proposed order, in which he recites that the class is "more properly defined to consist of all persons who purchased the above-designated securities between the above-designated dates (rather than those who gave 'orders for purchase' between such dates) in light of mechanical difficulties inherent in the task of determining when the order for purchase was given" has been deleted. Since Franklin New York Corporation's stock transfer records, as shown on the sample transfer journal page attached hereto as Exhibit A (which was furnished to me by counsel for defendant Ernst & Ernst, Messrs. Davis, Polk & Wardwell), appear to reflect only the date of certificate issu-

ance, not the date of purchase, resort to underlying records of the brokers through whom the orders were placed would appear to be necessary in any event. Since the "mechanical difficulties" referred to by plaintiff are thus not avoided by his formulation, there appears to be no substantial reason for varying Judge Judd's definition of the class.

(b) The counter order deletes the following sentence from paragraph 5 of plaintiff's proposed order:

> "Any persons who may have books or records containing the names and addresses of the class members or their nominees shall co-operate with Milberg & Weiss and make available to such counsel any and all such lists or other material for inspection and copying."

We believe that this language is too vague to be legally binding and will only lead to confusion about who are persons who "may have" the material referred to. If plaintiff anticipates any problem in obtaining access to books and records that is not covered by the provision directing the cooperation of the Trustee in Bankruptcy (last sentence of paragraph 5) it would seem preferable to address such problem by an order directed specifically to the persons involved.

(c) The period of time during which class members may elect to be excluded has been increased from 30 to 60 days.

(d) Provision has been made for payment of the cost of forwarding the Notice to beneficial purchasers (¶10).

(e) A new paragraph 11 has been added specifying that the Court reserves jurisdiction pursuant to F.R.Civ.P. 23(c)(1) to

modify, alter or amend the order. This provision is specifically called for by the last sentence of Judge Judd's Memorandum and Findings.

3. The proposed form of notice to class members accompanying the counter order differs from that proposed by plaintiff as follows:

(a) The statement that the Court has not passed on the merits of this action, and that receipt of Notice does not imply entitlement to recovery, has been moved from the last paragraph of the Notice to the first paragraph.

(b) The names of all defendants are included in the caption and no defendant is singled out for specific mention in ¶3. The language of ¶3 with respect to defendants' denials has also been clarified.

(c) A statement that all class members will be bound by the results unless they specifically request exclusion has been added to precede the explanation of the mechanics of exclusion (¶6, first sentence) and a Request for Exclusion form has been provided.

(d) A more detailed discussion of who will benefit from any judgment that may be entered in favor of the class has been added, including reference to how counsel for the class will be compensated (¶8, last sentence; ¶9).

(e) A proof of claim form is attached to the Notice and explained in ¶10. We believe it will better promote the efficient

conduct of the litigation to have information as to the size of the class and the amounts of respective class members' claimed damages (particularly after taking into account those purchasers who also sold during the class period) before the court early in the progress of the litigation. Since the form does not contemplate denial of recovery to class members who fail to file proof of claim prior to a judgment on the merits, we believe that it presents none of the problems on the basis of which some courts have postponed mailing of such forms until after judgment.

(f) A change of address form, explained in ¶11, has also been included.

Barbara A. Lee

Barbara A. Lee

Sworn to before me this
2nd day of Sept, 1976.

Notary Public

LEWIS H. SANDLER
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-3447130
Qualified in New York County
Commission Expires March 30, 1977

AMERICAN NATIONAL BANK

FRANKLIN NEW YORK CORP | COMMON | $3 PV | DATE TRANSFER JOURNAL 01/25/74 007

SURRENDERED BY				ISSUED TO		
RECEIPT NUMBER	NAME AND ADDRESS	CERTIFICATE NUMBER	NUMBER OF SHARES	NAME AND ADDRESS	CERTIFICATE NUMBER	NUMBER OF SHARES
1	1610763260 CONT			135-05-5167 ROSE S BERGEN 5001 COLLINS AVE APT 14 B MIAMI BEACH FL 33140	C 30334 / 30335	300
2	3760376520 EDWARDS & MANLY	C 30490	100	129-32-0203 JOSEPHINE A AGUSTA 65-50 75TH PL MIDDLE VILLAGE NY 11379	C 30637 / 30638	200
3	JANNEY MONTGOMERY SCOTT INC	C 30651	100			
4	4430053550 ROBERT P KASNOS	CO 002370	7	13-5313663 PERSHING & CO INC 120 BROADWAY NEW YORK N Y 10005	CO 24279	7
5	1 CLOSE & CO	C 28723	100	13-5 32251 HARRIS UPHAM & CO INCORPORATED 120 BROADWAY NEW YORK NEW YORK 10005	CO 24260 CO 24261	10 90
6	WALTER M ALVES IV	CO 348701	34	13-5132251 HARRIS UPHAM & CO INCORPORATED 120 BROADWAY NEW YORK NEW YORK 10005	CO 24262	34
7	DU PONT CLOSE FORGAN INCORPORATED	CO 24023	21	DU PONT CLOSE FORGAN INCORPORATED 1 WALL ST NEW YORK NY 10005	/ 24264 / 24265 CO 24266 CO 24267	9 8 3
8	C E RICHARD ELLIS & CO	CO 3859	300	WILLIAM CO C/O FRANKLIN NATL BK PERSONAL TR DEPT 100 PEARL ST NEW YORK NY 10015	C 30292 / 30293	300
9	MRS RUTH COOPER	C 10500 / 10501 CO 4902	200 10	RUTH COOPER & LORRAINE COOPER JT TEN 2114 E 26TH ST BROOKLYN NY 11229	C 30542 / 30543 CO 24291	200 10
10						
* TOTAL DEBIT SHARES FOR THIS ISSUE	01/25/74	3234		* TOTAL CREDIT SHARES FOR THIS ISSUE		3234

EXHIBIT A

967

A 63

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 COUNTER ORDER CERTIFYING CLASS AND DESIGNATING MANNER AND TIME OF NOTICE

WHEREAS, plaintiff Gold moved by notice of motion dated November 26, 1974, together with an accompanying affidavit of Melvyn I. Weiss and a memorandum of law, for an order certifying that the action of Gold v. Ernst & Ernst, et al. proceed as a class action; certain defendants filed memoranda in opposition to such motion dated June 19, 1975, July 11, 1975, December 18, 1975, and February 5, 1975; plaintiff Gold further filed affidavits of

Jared Specthrie (sworn to July 3, 1975) and of Melvyn I. Weiss (sworn to January 22, 1976), and a Response to Defendants' Sur-Reply Memorandum with Respect to Class Motion, and a Memorandum of Law dated July 3, 1975 in support of the motion; plaintiffs Gold, Mendes and Pergament filed a further memorandum in support of the aforesaid motion dated January 22, 1976; plaintiff Bookstein submitted an affidavit of Robert Kornreich in support of the motion sworn to January 21, 1976; plaintiffs, Gold, Mendes and Pergament filed Answers and Objections to Defendants' Class Action Interrogatories and plaintiff Gold filed an amended complaint on January 15, 1976;

AND WHEREAS, after due deliberation thereon, the Court determined in its Memorandum and Findings dated April 5, 1976 that class certification in the Gold action was proper and that the class should consist of all purchasers of common stock, preferred stock or capital notes of Franklin New York Corporation who "gave their orders for purchase" between July 16, 1974 and May 16, 1974 and directed plaintiff Gold to submit an Order determining the class as set forth in such Memorandum and Findings and specifying the time and manner of giving notice to the class;

NOW, THEREFORE, IT IS ORDERED, THAT:

1. The action of Gold v. Ernst & Ernst, et al. will proceed as a class action on behalf of all purchasers of common stock, preferred stock, or capital notes of Franklin New York Corporation who gave their orders for purchase between July 16, 1973 and May 16, 1974.

2. Plaintiff Gold, intervenor plaintiff Pergament, and plaintiff Mendes of Mendes v. Sindona, et al., are hereby designated as class representatives in the Gold action.

3. The form of notice attached hereto as Exhibit A ("the Notice") is the best Notice practicable under the circumstances to be sent to the members of the class. The Notice is in compliance with Rule 23(c)(2) of the Federal Rules of Civil Procedure.

4. Milberg & Weiss, liaison counsel for the class, be and hereby are designated to carry out the Notice program hereinafter set forth.

5. Milberg & Weiss shall expeditiously take such steps as may be necessary to obtain lists of the names and last known addresses of the class members defined herein in accordance with the provisions of this Order. Any such material within the possession, custody, or control of Sol Neil Corbin as trustee in bankruptcy of the Franklin New York Corporation, including lists or other material in the possession of any transfer agents of the Franklin New York Corporation, shall be furnished to Milberg & Weiss on or before September 30, 1976.

6. On or before October 30, 1976, Milberg & Weiss shall cause a copy of the Notice to be mailed by first class mail to members of the class or their nominees, at their last known addresses as they appear on the books and records of the Franklin New York Corporation and/or the records of the transfer agent of

Franklin New York Corporation and/or the trustee in bankruptcy of the Franklin New York Corporation.

7. Milberg & Weiss shall promptly rent a numbered Post Office Box in the City of New York, New York, in the name of the Clerk of the Court for the purpose of receiving communications and inquiries regarding Notice of this class action, and exclusion requests. All Notices to class members shall bear the caption of the consolidated litigation herein and of the Gold action, and shall bear the designation of said Post Office Box as the return address.

8. On or before November 10, 1976, plaintiff Gold shall file in the Court proof by affidavit of the mailing of the Notice in compliance with this Order.

9. The Notice shall provide that any request for exclusion be postmarked on or before sixty (60) days from the date of the mailing of the Notice. Plaintiff Gold shall file with the Clerk of the Court and make available to defendants all requests for exclusion as they are received from members of the class in response to the Notice.

10. All costs and expenses incurred incident to the preparation and mailing of the Notice, Request for Exclusion and Proof of Claim Form as set forth herein, including the cost of forwarding to beneficial owners by banks, brokerage firms and other institutions holding record title shall be borne by the class representatives subject to further Order of the Court.

11. The Court reserves jurisdiction pursuant to F.R. Civ. P. 23(c)(1) to modify, alter or amend this Order.

Dated: Brooklyn, New York
September , 1976

SO ORDERED:

_____
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 NOTICE OF PENDENCY OF CLASS ACTION

TO: ALL PURCHASERS OF THE SECURITIES OF FRANKLIN NEW YORK CORPORATION (COMMON STOCK, PREFERRED STOCK, AND CAPITAL NOTES) WHO GAVE ORDERS TO PURCHASE BETWEEN JULY 16, 1973 AND MAY 16, 1974.

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, you are hereby notified:

1. There is pending in this Court an action entitled Gold v. Ernst & Ernst, et al., Civil Action No. 75-C-684 (hereinafter "the Gold action"). The Court has not

passed upon the merits of the action or the respective claims or defenses and receipt of this Notice does not mean that you are entitled to any recovery. This Notice is merely to advise you of the pendency of the action and your rights above mentioned with respect to it. The Gold action is brought on behalf of persons or entities who purchased securities, debt or equity, of Franklin New York Corporation ("Franklin") during the period between July 16, 1973 and May 16, 1974. The Gold action seeks to recover damages sustained by such purchasers as a result of alleged violations by the defendants of the federal securities laws (Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder) and the common law. The claims arise out of alleged failures by defendants to disclose material facts concerning the results of operations and the economic condition of Franklin's susidiary the Franklin National Bank ("FNB").

2. The pleadings in the Gold action are available for review at the offices of the Clerk of the Court. Plaintiffs generally contend that materially misleading representations and omissions occurred in various documents including Franklin's annual reports to shareholders for 1972 and 1973 and Franklin's interim reports to shareholders for the first three quarters of 1973 and first quarter of 1974. The misrepresentations and omissions alleged include, but

are not limited to: (a) failure to disclose pervasive uncertainty concerning FNB's ability to survive as a going concern; (b) wrongful inflation of FNB's income and assets by failing to set forth a sufficient reserve for loan losses; (c) failure to reveal the importance to FNB's operations of excessive and improper speculation in high risk foreign exchange transactions; (d) failure to reveal inadequate internal control of foreign exchange trading activities and the existence of numerous activities designed to conceal material foreign exchange losses; (e) wrongfully reporting as an asset "tax benefits" which had unlikely prospects of being realized; (f) overstatement of trading account income and of the value of investment account securities; and (g) understating of trading account losses.

3. The defendants involved are Franklin's independent accountants, certain former officers and directors of Franklin and FNB, and certain former employees in the foreign exchange and international divisions of FNB. The defendants have denied liability to the plaintiffs and other class members the claims in the Gold action and have asserted various defenses, cross claims, and third party claims.

4. Various other actions have been brought concerning the economic collapse of the FNB and liabilities resulting therefrom. A number of such other actions have

together with the Gold action been consolidated for pre-trial purposes in the United States District Court for the Eastern District of New York under the title, In Re Franklin National Bank Securities Litigation - M.D.L. #196 (TCP), and the pleadings in such actions are available for review at the office of the Clerk of the Court. The Gold action is the only action in such consolidated litigation which has been certified as a class action by the Court.

5. Pursuant to a Memorandum and Findings dated April 5, 1976 and an Order dated , 1976, this Court has determined that the Gold action is a class action on behalf of all members of the public who purchased Franklin common stock, preferred stock or capital notes between July 16, 1973 and May 16, 1974. Class representatives include Robert Gold, who is the plaintiff in the Gold action; Louis Pergament, who intervened as an additional plaintiff in the Gold action; and Freida Mendes, who is the plaintiff in Mendes v. Sindona, et al., a proceeding also consolidated for pre-trial purposes with the other litigation involving Franklin in this Court. The class reprsentatives seek money damages for themselves and for the class as defined above.

6. All class members will be bound by the results of the pending litigation unless they specifically ask to be excluded. As a member of the class, you have the option pursuant to Rule 23(c)(2) of the Federal Rules of Civil Pro-

cedure and the Order of this Court to be excluded from the action if you request such exclusion by filling out the form entitled Request for Exclusion enclosed with this Notice and mailing it to

"Clerk, United States District Court
P. O. Box _____
New York, New York 10001"

If you request exclusion, do not fill out the Proof of Claim form discussed in ¶10.

7. If you request exclusion from the class:

(1) you will be excluded from the class:

(2) you will not be bound by a judgment against the class;

(3) you will not share in a recovery, if any, by the class, by settlement or judgment;

(4) you will not be precluded by reason of your election from prosecuting an individual claim, if timely, regardless of the outcome of the Gold action.

8. Should you wish to be included in the Class as defined in the Gold action, there is no need for you to take any action at this time, and you will continue to be represented by the above named class representatives. Pursuant to Rule 23(c)(2)(C) of the Federal Rules of Civil Procedure, if you do not request exclusion from the Class you may enter an appearance by counsel of your own choice; otherwise you

will be represented by counsel for the class representatives. You may also seek leave to intervene as a party in the Gold action. If plaintiffs are successful, all class members who do not ask to be excluded will share in any recovery; and if judgment is rendered in favor of all defendants, all class members would be denied any recovery.

9. If the plaintiffs do not succeed in this action, persons who do not exclude themselves from the class and who do not enter an appearance by their own attorneys will not be responsible for any of the costs of the litigation. If plaintiffs' counsel are successful and recover a judgment for the class, they will ask the Court for their payment of legal fees and expenses from the money recovered. Any award of fees and expenses rests in the discretion of the Court. If plaintiffs' counsel negotiate a settlement of this action, they will also ask the Court for the payment of their legal fees and expenses from the settlement fund. The Court must approve the terms of the settlement; and any award of fees and expenses rests in the discretion of the Court.

10. Enclosed with this Notice is a Proof of Claim form. If you have completed the Request for Exclusion (see ¶6), do not complete this form. If you have not requested exclusion complete this form and return it no later than , 197 to

"Clerk, United States District Court
P.O. Box _____
New York, New York 10001"

The proof of claim form merely asks you to state the losses, if any, you incurred in connection with your acquisition of Franklin New York Corporation Common Stock, Preferred Stock and/or Capital Notes. You should supply all the information, including the amount you paid to acquire the securities (excluding brokerage costs and expenses), the amount you received when you sold the securities (if applicable), and the difference between those two figures, which constitutes your loss.

11. Also appended to this Notice is a Change of Address form. The address to which this Notice was sent is the last address shown in the records of the transfer agent of Franklin New York Corporation. If the address on the envelope mailed to you was incorrect or if you move to a new address, please supply the information required on the Change of Address form and return that form to

"Clerk, United States District Court
P.O. Box _____
New York, New York 10001"

If the address orginally placed on the evelope containing this Notice was correct, you need not return the Change of Address form.

12. Inquiries regarding the Gold action may be addressed, in writing, to the liaison counsel for the class:

Milberg & Weiss
One Pennsylvania Plaza
New York, New York 10001

13. Banks, brokerage firms, and other institutions holding record title as of any day from July 16, 1973 through and including May 16, 1974 to Franklin securities beneficially owned by others are required to forward this notice to the beneficial owners.

14. Pursuant to Federal Rules of Civil Procedure Rule 23(c)(1), the Court reserves jurisdiction to modify, alter or amend the above described Order maintaining the Gold action as a class action at any time before a final disposition of the matters herein described.

Dated: Brooklyn, New York
, 1976

By_____ _____
Clerk

United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE	
FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,	75-C-684
Plaintiff,	
- and -	
LOUIS PERGAMENT,	
Intervenor-Plaintiff,	REQUEST FOR EXCLUSION
- against -	
ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO,	
Defendants.	

I hereby request exclusion from the class on whose behalf this action is being brought.

_____
Signature

_____
Name (print or type)

_____
Address

_____
City, State and Zip Code

Dated: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 PROOF OF CLAIM

Note: Completing and returning this form is entirely voluntary on your part. Your failure to do so at this time will not preclude you from a recovery in the event plaintiffs are successful in these actions.

Name: _____

Adress: _____

_____

Common Stock

I acquired shares of the common stock of Franklin New York Corporation on _____ at $_____per share for a total price of $_____

I have sold common stock of Franklin New York Corporation as follows:

Date	No. of Shares	Price per Share	Total Price

I have disposed of _____ shares of common stock on _____ 19__, otherwise than by selling them as follows:

I still hold _____ shares of common stock.

Preferred Stock

I acquired _____ shares of the preferred stock of Franklin New York Corporation on _____ at $_____ per share for a total price of $_____

I have sold preferred stock of Franklin New York Corporation as follows:

Date	No. of Shares	Price per Share	Total Price

I have disposed of _____ shares of preferred stock on _____ 19__, otherwise than by selling them as follows:

I still hold _____ shares of preferred stock.

Capital Notes

I acquired $_____ face amount of the capital notes of Franklin New York Corporation on _____ for a total price of $_____.

I have sold capital notes of Franklin New York Corporation as follows:

Date	Face Amount	Total Price

I have disposed of $_____ face amount of capital notes of Franklin New York Corporation, otherwise than by sale, on _____ 19__, as follows:

I still hold $_____ face amount of the capital notes.

I certify that all of the information included in this Proof of Claim is true and accurate.

_____
Signature

Dated:

[If additional space is needed, please use the back of this form.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 CHANGE OF ADDRESS FORM

The address originally placed on the envelope bearing the Notice of Pendency of Class Action was:

_____

_____

_____

The address at which I can be reached currently is:

_____

_____

_____

The address at which I can be reached during the next twelve (12) months is:

_____

_____

_____

I can be reached at this address (as of/during):

_____

_____
(Signature)

Dated:

Transcript of Proceedings before Judge Platt in M.D.L. #196, September 3, 1976, Pages 41-45

had been raised.

It does not create a false impression. It is certainly burdensome, but the notice has to go out anyway and there is one additional piece of paper, and there is no additional postal expenses.

THE COURT: I'll take briefs on that question before September 17th, if either of you wish to submit briefs. Maybe you can give me one or more authorities.

What was the other question?

MR. WEISS: Your Honor, the question of whether or not the Plaintiff representatives should be required to pay cost to nominee holders, pre-paying situations, to beneficial owners. This is a very major and important question. Especially in a situation where we have a notice of pendency going out without a settlement also attached to it.

It's an issue that is now before Judge Weinstein, in another matter, in this District. It's an issue that was just resolved in the Penn Central case in favor of the Plaintiff's stand here. It's an issue that was resolved in a case, Weiss v. National in the Southern District of New York which takes the defendant's point of view. In that case there is a motion for reconsideration.

The issue is a far-reaching one and just in capsule I will give you what our concern is:

The nominee names that appear on the company's transfer records number into the hundreds, literally. In recent cases where we've sent out notices of class and settlement or one or the other separately, we've been getting bills from the brokerage firms, sometimes in the thousands of dollars saying they have to go through their computer records for the years involved to see how many beneficial owners there are. Sometimes they only come up with two or three. Sometimes they come up with hundreds. Sometimes they come up with more.

In any event, if each one of these brokers sends us a bill for 300, 500, a thousand dollars, and sometimes even greater than that, we can see the enormous impact on the ability to have a class action in our society. We're running into a situation, we start up front with an expenditure between 50 and 200 thousand dollars. Even in a case where the number of class people might only be thousands, five thousand or six thousand.

Now, we argue, essentially, responsibility to give this notice to the beneficial owners rests with the broker and traditionally that's the way the courts have handled it. It's only been in the last several

months that the issue was raised by the brokers because of the ingenuity of a particular law firm that started to represent them on the decision. I suspect the first few judges that dealt with this really didn't appreciate the enormity of the question.

THE COURT: It certainly must be an enormous question in the case of Penn Central.

MR. WEISS: That's right. And having the Ampex settlement we just sent out notice on Wednesday. It was a substantial fund of $9 million. We started to get bills from brokers, $900, $800, $1,600. It became astronomical.

The point that we make that are the basic duties --

THE COURT: Have any Court of Appeals passed on this question?

MR. WEISS: No. There's one issue that I'm sure the defendants will raise as an analogous one. We say it isn't. There is a recent Second Circuit decision, Saunders v. Levy, where the question was who is to pay the cost of obtaining the names of the record holders as opposed to the beneficial holders. There, the Court said that even if that process is exceedingly costly because the records are on computers,

the price of that cost of that job should lie with the plaintiffs.

THE COURT: That would all be in one spot.

MR. WEISS: Yes, basically it was just an expensive procedure. But that does not deal with the second layer of beneficial --

THE COURT: There is the Penn Central case and there is a case in the Southern District and there is a case before Judge Weinstein.

MR. WEISS: There are some others in our brief.

THE COURT: It's something you are going to have to resolve.

MR. WEISS: It is in our brief.

THE COURT: Can you have that brief to me also by September 17th?

MR. WEISS: No problem.

THE COURT: I'll also have to resolve that question and I'll have to see what, if anything, Judge Weinstein has done.

MR. WEISS: Your Honor, the argument in that case is September 27. We worked with the attorneys in that case on this issue, even though we're not in it, as you might realize --

THE COURT: So you can dump it in my lap ten days

before you dump it in his lap.

MR. WEISS: Also we want to make an argument interpreting the Eisen case in the Supreme Court, what type of notice the Eisen case contemplates and finds necessary under Rule 23.

THE COURT: Is that agreeable to you, September 17th?

MS. LEE: Yes, September 17th.

MR. WEISS: I can't say, your Honor, that I've covered all of the issues. I've had a very short period of time to review the proposal of the defendants. I can promise that by next Wednesday I can articulate all of the differences we have with defendants on their proposal other than the ones that I have mentioned this morning.

THE COURT: All right, it's possible that when you articulate the differences, to discuss with Miss Lee whether they can be resolved. In my quick reading of it last night on the train, her affidavit, I didn't really see anything, apart from the two. I thought the peripheral issue would not be one you would necessarily get hung up on. But the others didn't seem to me too significant. Maybe I am missing something.

Affidavit of Paul Koepff,
sworn to September 16, 1976

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

IN RE	:	
FRANKLIN NATIONAL BANK SECURITIES LITIGATION	:	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,	:	75-C-684
Plaintiff,	:	
-and-	:	
LOUIS PERGAMENT,	:	
Intervenor-Plaintiff,	:	
-against-	:	AFFIDAVIT
ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO,	:	
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PAUL R. KOEPFF being duly sworn, deposes and says:

1. I am an associate at Davis Polk & Wardwell, attorneys for defendant Ernst & Ernst. I make this affidavit in support of the counter order certifying the class and designating the manner and time of notice submitted by defendants Crosse, Gleason, Luftig, Bordoni, Sindona and Ernst & Ernst.

2. A proof of claim form would aid in promoting

the efficient conduct of the Gold litigation because the responses to it will provide needed and useful information as to the size of the class and the amounts of the respective class members' claimed damages. Such information is not presently available.

3. From October 1975 to February 1976, Davis Polk & Wardwell and its client Ernst & Ernst undertook to determine the size of the class and the amounts of the respective class members' claimed damages for Franklin New York Corporation ("FNYC") common stock, its $2.45 convertible preferred stock, its $4.60 preferred stock, its capital debentures, and its capital notes. It was thought that the transfer records could be used to determine the number of purchasers (or class members) of each of such FNYC security, the amount of each security purchased and the price paid by those purchasers (or class members), and whether there were, and if so the amount and the price of, any subsequent sales by those purchasers (or class members).* As set forth below this analysis was unsuccessful because of the difficulties encountered in using the transfer records of FNYC.

4. A copy of a page or entry from the transfer journal for each FNYC security, except FNYC capital debentures, is attached hereto as Exhibit A. The information provided on these sheets is limited to (i) the dates when the certificate for a particular number of securities was surrendered and when a new one was issued, (ii) the number of securities on the certificate being surrendered and on the new one

---

* While persons who subsequently sold are members of the Gold class, the fact that they sold their FNYC securities does reduce the total amount of damages that they can claim. Memorandum and Findings, dated April 5, 1976 (p. 11) (OGJ).

being issued, (iii) the names of the record holders of the certificate being surrendered and of the new one being issued, and (iv) the certificate numbers for the certificate being surrendered and for the new one being issued.

5. The difficulties encountered by Davis Polk & Wardwell in using the FNYC transfer records were that:

(a) The date on the transfer sheet does not reflect the true date of the actual purchase, which occurred at some unknown earlier point of time.* This was particularly problematic for determining the actual price paid for FNYC common stock,** which did not remain constant but, with some exceptions, declined throughout 1973 and 1974. As a consequence, we were not able to ascertain the price paid by each purchaser of FNYC securities.

(b) For several reasons, the names and numbers of the new holders of record for FNYC securities between July 16, 1973 and May 16, 1974 does not accurately reflect the names and number of purchasers of such securities in that period of time. There may be an entry of a new holder of record in the transfer book for a variety of reasons other than a true purchase (e.g., when a certificate was lost or destroyed or a gift or bequest required changing the name of the record

---

* The period of time between the date on the transfer records and the date of a purchase cannot be accurately estimated, since this can depend upon such factors as how long it took a particular broker to send in the necessary papers or how long it took the transfer agent to process the papers.

** For purposes of the analysis, the actual price paid on a particular day was assumed to equal the average bid/ask price for FNYC common stock for that day. Except for $2.45 preferred stock, this assumption could not be made for the other FNYC securities. (See para. 6(a) infra.)

holder a new certificate was issued). Likewise, there may be occasions when there was no entry of a new holder of record in the transfer book even though FNYC securities were purchased. In addition, while some of the holders of record are individuals, this represents only a small number of the FNYC securities listed in the transfer books. The vast majority of FNYC securities listed in the transfer books reflect the names of brokers, nominee names, or street names as the holders of record; for these securities there is simply no indication of the number or names of the beneficial owners.

(c) For the same reasons as specified in subparagraph (b) above, the number of securities on the new certificate being issued does not accurately reflect the number of FNYC securities actually purchased.

(d) For the same reasons specified in subparagraphs (a), (b) and (c) above, the names and numbers of purchasers who subsequently sold their FNYC securities cannot be accurately identified, nor can the amount of FNYC securities which they subsequently sold be accurately ascertained. Likewise the certificate numbers reflected on the transfer records cannot be used to trace subsequent sales.

(e) While no transfer records concerning FNYC capital debentures were provided to Davis Polk & Wardwell, the problems for capital debentures should be no different than those encountered for the other FNYC securities

6. The only other information available to analyze the amounts of the respective class members' claimed

damages, of which I am aware, is the volume of trading and the quoted bid and ask prices which are reported to the National Association of Securities Dealers, Inc. ("NASD") and published in various financial newspapers such as The Wall Street Journal. This information can be and has been used to determine the outermost limit of the claimed class action damages for purchasers of FNYC common stock and $2.45 preferred stock.

7. However, this information reported to the NASD and published in various financial newspapers has its own drawbacks:

(a) The NASD has informed me that there is no such information at all with respect to FNYC's $4.60 preferred stock, its capital debentures and its capital notes.

(b) The number and names of purchasers of FNYC common stock and $2.45 preferred stock cannot be determined from the trading figures.

(c) The actual price paid for FNYC common stock and $2.45 preferred stock cannot be precisely determined since the information as to price is the average of the bid and ask price.

(d) Subsequent sales by purchasers of FNYC common stock and $2.45 preferred stock cannot be determined at all.

(e) Finally, the NASD has informed me that the daily volume of trading as reported to the NASD for FNYC common stock and $2.45 preferred stock, and as published in financial newspapers, may well exceed the total number of FNYC common stock or $2.45 preferred stock that was actually purchased on that day.

WHEREFORE, it is respectfully requested that the Court approve the counter order submitted by defendants Crosse, Gleason, Luftig, Bordoni, Sindona and Ernst & Ernst.

Paul R. Koepff

Paul R. Koepff

Sworn to before me this
16th day of September, 1976.

Notary Public

C. CLIA ANN PANZIALE
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Certificate Filed in New York County
Commission Expires March 30, 1978

EXHIBIT A

FNYC COMMON STOCK
DAILY TRANSFER JOURNAL

FRANKLIN NATIONAL BANK

FRANKLIN NEW YORK CORP — COMMON — 85 PV — DAILY TRANSFER JOURNAL 01/25/74 464

SURRENDERED BY				ISSUED TO		
RECEIPT NUMBER / NAME AND ADDRESS	CERTIFICATE NUMBER	NUMBER OF SHARES		NAME AND ADDRESS	CERTIFICATE NUMBER	NUMBER OF SHARES
C 0015106 CUST 1				102-18-3164 ADOLPH FISCHER 12 HUNTING LA EAST E LIP NY 11730	C 30816 CO 24760	200 50
C 0015267 M E MUTTUM & CO 2	C 30650	100		13-2555114 CEDE & CO BOX 20 BOWLING GREEN STATION NEW YORK NEW YORK 10004 2	CU 3978	506
SHEARSON HAMMILL & CO INCORPORATED 3	CO 24041 CU 24040	50 50		3		
CEDE & CO 4	C 28725	100		4		
LUCILE M KENNEY 5	CO 244	56		5		
DU PONT-GLORE FORGAN INCORPORATED 6	C 30315	100		6		
REYNOLDS SECURITIES INC 7	CO 24187	50		7		
2773100 THOMAS M BASSETT 8	C 65522 CO 43515 CO 44637 CO 47080 CO 44818	100 50 4 4 4		13-5213363 LUER ANNUITIES & CU 42 WALL STREET NEW YORK NEW YORK 10005 8	CO 24261 C 30814	42 100
C 4336000 HARRY A SCHROEDER 9	CO 45900 CO 43895 CO 38806 CO 34780 CO 38737 CO 30724 CO 16572	2 2 2 2 2 2 50		065-38-3936 ETHEL L SCHROEDER 570 N 6TH ST NEW HYDE PARK NY 9	CO 24263	82
HARRY A SCHROEDER 10	CO 42331 CO 34815 CO 38815 CO 30415 CO 30415 CO 30415 CO 30415	2 2 2 2 2 2 2		10		
* TOTAL DEBIT SHARES FOR THIS ITEM	01/25/74			* TOTAL CREDIT SHARES FOR THIS ITEM	464	

EXHIBIT A

FNYC $2.45 PREFERRED STOCK
DAILY TRANSFER JOURNAL

SURRENDERED BY				ISSUED TO			
RECEIPT NUMBER	NAME AND ADDRESS	CERTIFICATE NUMBER	NUMBER OF SHARES	NAME AND ADDRESS	CERTIFICATE NUMBER	NUMBER OF SHARES
1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
6						
7						
8						
9						
10						

A 96

EXHIBIT A

FNYC $4.60 PREFERRED STOCK
DAILY TRANSFER JOURNAL

SURRENDERED BY			ISSUED TO		
RECEIPT NUMBER / NAME AND ADDRESS	CERTIFICATE NUMBER	NUMBER OF SHARES	NAME AND ADDRESS	CERTIFICATE NUMBER	NUMBER OF SHARES
1	PO 1441 PO 1442	1 1	1 SPENCER TRASK & CO [illegible] [illegible]	PU / 1440 1441	2 A 98
2			2		
3			3		
4			4		
5			5		
6			6		
7			7		
8			8		
9			9		
10			10		
* TOTAL DEBIT SHARES			* TOTAL CREDIT SHARES		

EXHIBIT A

FNYC CAPITAL 7.30% CAPITAL NOTES
DAILY TRANSFER JOURNAL

10-72

MORGAN GUARANTY TRUST COMPANY OF NEW YORK

CERTIFICATES SURRENDERED	CERT. NO.	SHARES	CERTIFICATES ISSUED	CERT. NO.	SHARES
W 36231 SYDAM & CO 1	NL01010/3 NX02101/10	100000 100000	PERT & CO 2:10CM C/ IRVING TRUST CO PERSONAL TRUST DIVISION ONE WALL STREET NEW YORK NY 10015 1	NL03029/30	200000
L 24490 MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED 2	NX02280	10000	TRUST COMPANY OF GEORGIA TRUSTEE U/A WITH MRS MYRTLE H CARLYLE DTD 11/27/72 C/ TRUST CO COMPANY OF GEORGIA TRUST DEPT ACCOUNT PO BOX 4656 ATLANTA GA 2	NX02301	10000

DATE 8/30/73 LLE

TOTAL 210000

CAPITAL STOCK

FRANKLIN NEW YORK CORPORATION
7.30% NOTE DUE 11/15/79
SHEET 1 NR

TOTAL 210000

A 100

Defendants' Proposed Order Certifying
Class Served September 17, 1976, together
with attached Proposed Notice of Pendency

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 ORDER CERTIFYING CLASS AND DESIGNATING MANNER AND TIME OF NOTICE

WHEREAS, plaintiff Gold moved by notice of motion dated November 26, 1974, together with an accompanying affidavit of Melvyn I. Weiss and a memorandum of law, for an order certifying that the action of Gold v. Ernst & Ernst, et al. proceed as a class action; certain defendants filed memoranda in opposition to such motion dated June 19, 1975, July 11, 1975, December 18, 1975, and February 5, 1975; plaintiff Gold further filed affidavits of

Jared Specthrie (sworn to July 3, 1975) and of Melvyn I. Weiss (sworn to January 22, 1976), and a Response to Defendants' Sur-Reply Memorandum with Respect to Class Motion, and a Memorandum of Law dated July 3, 1975 in support of the motion; plaintiffs Gold, Mendes and Pergament filed a further memorandum in support of the aforesaid motion dated January 22, 1976; plaintiff Bookstein submitted an affidavit of Robert Kornreich in support of the motion sworn to January 21, 1976; plaintiffs, Gold, Mendes and Pergament filed Answers and Objections to Defendants' Class Action Interrogatories and plaintiff Gold filed an amended complaint on January 15, 1976;

AND WHEREAS, after due deliberation thereon, the Court determined in its Memorandum and Findings dated April 5, 1976 that class certification in the Gold action was proper and that the class should consist of all purchasers of common stock, preferred stock or capital notes of Franklin New York Corporation who "gave their orders for purchase" between July 16, 1973 and May 16, 1974 and directed plaintiff Gold to submit an Order determining the class as set forth in such Memorandum and Findings and specifying the time and manner of giving notice to the class;

AND WHEREAS, upon further consideration, it appears that the class is more properly defined to consist of all persons who purchased the above designated securities between the above designated dates (rather than those who gave "orders for purchase" between such dates) in light of mechanical difficulties inherent in the task of determining when the order for purchase was given;

NOW, THEREFORE, IT IS ORDERED, THAT:

1. The action of Gold v. Ernst & Ernst, et al. will proceed as a class action on behalf of all purchasers of common stock, preferred stock, or capital notes of Franklin New York Corporation who purchased any of such securities between July 16, 1973 and May 16, 1974.

2. Plaintiff Gold, intervenor plaintiff Pergament, and plaintiff Mendes of Mendes v. Sindona, et al., are hereby designated as class representatives in the Gold action.

3. The form of notice attached hereto as Exhibit A ("the Notice") is the best Notice practicable under the circumstances to be sent to the members of the class. The Notice is in compliance with Rule 23(c)(2) of the Federal Rules of Civil Procedure.

4. Milberg & Weiss, liaison counsel for the class, be and hereby are designated to carry out the Notice program hereinafter set forth.

5. Milberg & Weiss shall expeditiously take such steps as may be necessary to obtain lists of the names and last known addresses of the class members defined herein in accordance with the provisions of this Order. Subject to the provisions of paragraph 10 of this Order, any persons who may have books or records containing the names and addresses of the class members or their nominees shall cooperate with Milberg & Weiss and make available to such counsel any and all such lists or other material

for inspection and copying. Any such material within the possession, custody, or control of Sol Neil Corbin as trustee in bankruptcy of the Franklin New York Corporation, including lists or other material in the possession of any transfer agents of the Franklin New York Corporation, shall be furnished to Milberg & Weiss on or before September 30, 1976.

6. On or before October 30, 1976, Milberg & Weiss shall cause a copy of the Notice to be mailed by first class mail to members of the class or their nominees, at their last known addresses as they appear on the books and records of the Franklin New York Corporation and/or the records of the transfer agent of Franklin New York Corporation and/or the trustee in bankruptcy of the Franklin New York Corporation.

7. Milberg & Weiss shall promptly rent a numbered Post Office Box in the City of New York, New York, in the name of the Clerk of the Court for the purpose of receiving communications and inquiries regarding Notice of this class action, and exclusion requests. All Notices to class members shall bear the caption of the consolidated litigation herein and of the Gold action, shall be sent in the name of the Clerk of the Court, and shall bear the designation of said Post Office Box as the return address.

8. On or before November 10, 1976, plaintiff Gold shall file in the Court proof by affidavit of the mailing of the Notice in compliance with this Order.

9. The Notice shall provide that any request for exclusion be postmarked on or before sixty (60) days from the date of the mailing of the Notice. Plaintiff Gold shall file with the Clerk of the Court and make available to defendants all requests for exclusion as they are received from members of the class in response to the Notice.

10. All costs and expenses incurred incident to the preparation and mailing of the Notice, Request for Exclusion and Proof of Claim Form as set forth herein, including the cost of forwarding to beneficial owners by banks, brokerage firms and other institutions holding record title, shall be borne by the class representatives subject to further Order of the Court.

11. The Court reserves jurisdiction pursuant to F.R. Civ. P. 23(c)(1) to modify, alter or amend this Order.

Dated: Brooklyn, New York
September , 1976

SO ORDERED:

_____

U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 NOTICE OF PENDENCY OF CLASS ACTION

TO: ALL PURCHASERS OF THE SECURITIES OF FRANKLIN NEW YORK CORPORATION (COMMON STOCK, PREFERRED STOCK, AND CAPITAL NOTES) PURCHASED BETWEEN JULY 16, 1973 AND MAY 16, 1974.

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, you are hereby notified:

1. There is pending in this Court an action entitled Gold v. Ernst & Ernst, et al., Civil Action No. 75-C-684 (hereinafter "the Gold action"). The Gold action is

brought on behalf of persons or entities who purchased securities, debt or equity, of Franklin New York Corporation ("Franklin") during the period between July 16, 1973 and May 16, 1974. The Gold action seeks to recover damages sustained by such purchasers as a result of alleged violations by the defendants of the federal securities laws (Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder) and the common law. The claims arise out of alleged failures by defendants to disclose material facts concerning the results of operations and the economic condition of Franklin's susidiary the Franklin National Bank ("FNB").

2. The pleadings in the Gold action are available for review at the offices of the Clerk of the Court. Plaintiffs generally contend that materially misleading representations and omissions occurred in various documents including Franklin's annual reports to shareholders for 1972 and 1973 and Franklin's interim reports to shareholders for the first three quarters of 1973 and first quarter of 1974. The misrepresentations and omissions alleged include, but are not limited to: (a) failure to disclose pervasive uncertainty concerning FNB's ability to survive as a going concern; (b) wrongful inflation of FNB's income and assets by failing to set forth a sufficient reserve for loan losses; (c) failure to reveal the importance to FNB's operations of

excessive and improper speculation in high risk foreign exchange transactions; (d) failure to reveal inadequate internal control of foreign exchange trading activities and the existence of numerous activities designed to conceal material foreign exchange losses; (e) wrongfully reporting as an asset "tax benefits" which had unlikely prospects of being realized; (f) overstatement of trading account income and of the value of investment account securities; and (g) understating of trading account losses.

3. The defendants involved are Franklin's independent accountants, certain former officers and directors of Franklin and FNB, and certain former employees in the foreign exchange and international divisions of FNB. The defendants have denied liability to the plaintiffs and other class members the claims in the Gold action and have asserted various defenses, cross claims, and third party claims.

4. Various other actions have been brought concerning the economic collapse of the FNB and liabilities resulting therefrom. A number of such other actions have together with the Gold action been consolidated for pre-trial purposes in the United States District Court for the Eastern District of New York under the title, In Re Franklin National Bank Securities Litigation - M.D.L. #196 (TCP), and the pleadings in such actions are available for review at the

office of the Clerk of the Court. The Gold action is the only action in such consolidated litigation which has been certified as a class action by the Court.

5. Pursuant to a Memorandum and Findings dated April 5, 1976 and an Order dated , 1976, this Court has determined that the Gold action is a class action on behalf of all members of the public who purchased Franklin common stock, preferred stock or capital notes between July 16, 1973 and May 16, 1974. Class representatives include Robert Gold, who is the plaintiff in the Gold action; Louis Pergament, who intervened as an additional plaintiff in the Gold action; and Freida Mendes, who is the plaintiff in Mendes v. Sindona, et al., a proceeding also consolidated for pre-trial purposes with the other litigation involving Franklin in this Court. The class reprsentatives seek money damages for themselves and for the class as defined above.

6. The Court has not passed upon the merits of the Gold action or the respective claims or defenses and receipt of this Notice does not mean that you are entitled to any recovery. This Notice is merely to advise you of the pendency of the action and your rights with respect to it.

7. All class members will be bound by the results of the pending litigation unless they specifically ask to be

excluded. As a member of the class, you have the option pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure and the Order of this Court to be excluded from the action if you request such exclusion by filling out the form entitled Request for Exclusion enclosed with this Notice and mailing it to

"Clerk, United States District Court
P. O. Box _____
New York, New York 10001"

If you request exclusion, do not fill out the Proof of Claim form discussed in ¶11.

8. If you request exclusion from the class:

(1) you will be excluded from the class:

(2) you will not be bound by a judgment against the class;

(3) you will not share in a recovery, if any, by the class, by settlement or judgment;

(4) you will not be precluded by reason of your election from prosecuting an individual claim, if timely, regardless of the outcome of the Gold action.

9. Should you wish to be included in the Class as defined in the Gold action, there is no need for you to take any action at this time, and you will continue to be represented by the above named class representatives. Pursuant to Rule 23(c)(2)(C) of the Federal Rules of Civil Procedure,

if you do not request exclusion from the Class you may enter an appearance by counsel of your own choice; otherwise you will be represented by counsel for the class representatives. You may also seek leave to intervene as a party in the Gold action. If plaintiffs are successful, all class members who do not ask to be excluded will share in any recovery; and if judgment is rendered in favor of all defendants, all class members would be denied any recovery.

10. If the plaintiffs do not succeed in this action, persons who do not exclude themselves from the class and who do not enter an appearance by their own attorneys will not be responsible for any of the costs of the litigation. If plaintiffs' counsel are successful and recover a judgment for the class, they will ask the Court for their payment of legal fees and expenses from the money recovered. Any award of fees and expenses rests in the discretion of the Court. If plaintiffs' counsel negotiate a settlement of this action, they will also ask the Court for the payment of their legal fees and expenses from the settlement fund. The Court must approve the terms of the settlement; and any award of fees and expenses rests in the discretion of the Court.

11. Enclosed with this Notice is a Proof of Claim form. If you have completed the Request for Exclusion (see ¶7), do not complete this form. If you have not requested

exclusion complete this form and return it no later than

, 197 to

"Clerk, United States District Court
P.O. Box _____
New York, New York 10001"

The proof of claim form merely asks you to state the losses, if any, you incurred in connection with your acquisition of Franklin New York Corporation Common Stock, Preferred Stock and/or Capital Notes. You should supply all the information, including the amount you paid to acquire the securities (excluding brokerage costs and expenses), the amount you received when you sold the securities (if applicable), and the difference between those two figures, which constitutes your loss.

12. Also appended to this Notice is a Change of Address form. The address to which this Notice was sent is the last address shown in the records of the transfer agent of Franklin New York Corporation. If the address on the envelope mailed to you was incorrect or if you move to a new address, please supply the information required on the Change of Address form and return that form to

"Clerk, United States District Court
P.O. Box _____
New York, New York 10001"

If the address orginally placed on the evelope containing this Notice was correct, you need not return the Change of Address form.

13. Inquiries regarding the Gold action may be addressed, in writing, to the liaison counsel for the class:

Milberg & Weiss
One Pennsylvania Plaza
New York, New York 10001

14. Banks, brokerage firms, and other institutions holding record title as of any day from July 16, 1973 through and including May 16, 1974 to Franklin securities beneficially owned by others are required to forward this notice to the beneficial owners.

15. Pursuant to Federal Rules of Civil Procedure Rule 23(c)(1), the Court reserves jurisdiction to modify, alter or amend the above described Order maintaining the Gold action as a class action at any time before a final disposition of the matters herein described.

Dated: Brooklyn, New York
, 1976

By_____
Clerk

United States District Court

A 114

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 REQUEST FOR EXCLUSION

I hereby request exclusion from the class on whose behalf this action is being brought.

_____
Signature

_____
Name (print or type)

_____
Address

_____
City, State and Zip Code

Dated: _____

A 115

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 PROOF OF CLAIM

Note: Completing and returning this form is entirely voluntary on your part. Your failure to do so at this time will not preclude you from a recovery in the event plaintiffs are successful in these actions.

Name: _____

Adress: _____

_____

Common Stock

I acquired shares of the common stock of Franklin New York Corporation on _____ at $_____per share for a total price of $_____

I have sold common stock of Franklin New York Corporation as follows:

Date	No. of Shares	Price per Share	Total Price

I have disposed of _____ shares of common stock on _____ 19__, otherwise than by selling them as follows:

I still hold _____ shares of common stock.

Preferred Stock

I acquired _____ shares of the preferred stock of Franklin New York Corporation on _____ at $_____ per share for a total price of $_____

I have sold preferred stock of Franklin New York Corporation as follows:

Date	No. of Shares	Price per Share	Total Price

I have disposed of _____ shares of preferred stock on _____ 19__, otherwise than by selling them as follows:

I still hold _____ shares of preferred stock.

Capital Notes

I acquired $_____ face amount of the capital notes of Franklin New York Corporation on _____ for a total price of $_____.

I have sold capital notes of Franklin New York Corporation as follows:

Date	Face Amount	Total Price

I have disposed of $_____ face amount of capital notes of Franklin New York Corporation, otherwise than by sale, on _____ 19__, as follows:

I still hold $_____ face amount of the capital notes.

I certify that all of the information included in this Proof of Claim is true and accurate.

_____
Signature

Dated:

[If additional space is needed, please use the back of this form.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 CHANGE OF ADDRESS FORM

The address originally placed on the envelope bearing the Notice of Pendency of Class Action was:

_____

_____

_____

The address at which I can be reached currently is:

_____

_____

_____

The address at which I can be reached during the next twelve (12) months is:

_____

_____

_____

I can be reached at this address (as of/during):

_____

_____
(Signature)

Dated:

Defendants' Memorandum in Support of
Proposed Class Action Order
dated September 17, 1976

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 MEMORANDUM OF CERTAIN DEFENDANTS IN SUPPORT OF PROPOSED CLASS ACTION ORDER

PRELIMINARY STATEMENT

This Memorandum is submitted in response to the direction of the Court at the pre-trial conference held September 3, 1976, and in support of the Counter Order submitted at that time by defendants Crosse, Gleason, Luftig,

Bordoni, Sindona and Ernst & Ernst certifying the class in this action and providing for notice. In the interim, all but two of the differences between plaintiffs' and defendants' proposed orders have been resolved by agreement. We accordingly submit herewith a new form of proposed order which reflects these agreed changes, and which we understand to differ from the form of order being submitted simultaneously by plaintiffs only in respect of the two points of substantive difference which are the subject of this exchange of briefs. Those two differences are:

1. Defendants would provide for the inclusion of a proof of claim form which makes clear on its face that no substantive rights will be lost by failing to complete it at the present time. Plaintiffs' proposed order contains no corresponding provision, and plaintiffs would await a settlement or a determination of liability before seeking documentation of the size of the class and the amount of damages claimed. The extent to which the early availability of this information can contribute to the efficient administration and possible settlement of this litigation is discussed in Point I, pp. 3-8 infra.

2. Defendants' proposed order expressly provides for the payment by plaintiffs of the expense of forwarding the notice to members of the class whose stock is held in "street" name. Plaintiffs' proposed order omits this provision, and is silent as to who, if anyone, would bear the cost of either

forwarding the notice or identifying the beneficial holders for the purpose of addressing them directly. It is not disputed that a significant portion of the record holders shown on the transfer agent's records are brokers, banks or their nominees,[1/] but precise figures are not in the record. The impropriety of imposing such expenses on anyone other than plaintiffs, and the inadequacy of a notice addressed only to nominees without provision for forwarding, are discussed in Point II, pp. 8-27, infra.

The first of these issues is a matter within the discretion of the District Court; the second raises fundamental questions of due process, affecting the validity of any judgment or settlement in this litigation.

ARGUMENT

I. NOTICE TO CLASS MEMBERS WHICH INCLUDES A VOLUNTARY PROOF OF CLAIM FORM, WITH NO PENALTY FOR FAILURE TO RESPOND, IS A PROPER EXERCISE OF THE COURT'S DISCRETION.

The following statement is prominently placed on the first page of the proof of claim form which defendants propose to mail with the class action notice:

1/ See Affidavit of Paul R. Koepff, sworn to September 16, 1976 and submitted herewith.

"Note: Completing and returning this form is entirely voluntary on your part. Your failure to do so at this time will not preclude you from a recovery in the event plaintiffs are successful in these actions."

The form calls for simple factual information which class members would normally preserve for income tax purposes: the number of shares or face amount of debt securities bought and sold, the price paid and received, and the relevant dates.

At the September 3 pre-trial conference, plaintiffs objected to inclusion of a proof of claim form with the initial notice on the grounds, among others, that it would be confusing to class members and inconsistent with the "opt-out" procedures adopted in the 1966 revision of Rule 23. Accordingly, we expect plaintiffs to cite the numerous cases holding that requiring proof of claim as a condition of continued class membership is improper prior to a determination of liability.[2/] This line of authority is irrelevant, because the form here proposed is entirely voluntary, does not determine a class member's right to share in any judgment which may be entered in favor of the class, and expressly says so on its face.

The propriety of this type of voluntary proof

2/ See generally 7A Wright & Miller, Federal Practice & Procedure §1787 (1972) and cases cited.

of claim has less frequently been the subject of reported judicial opinions than has the type purporting to require some affirmative action by class members. Nevertheless, the relatively few cases in which the issue has been contested make clear that use of this procedure is a proper exercise of the District Court's discretion.

The leading case is Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970), a securities case in which a form for proof of claim was mailed simultaneously with the initial notice. In addition to facts about purchases and sales such as are requested here, it included questions about class members' reliance. Judge Mansfield recognized the problems involved in requiring a response early in the litigation, specifically the

> "fundamental inconsistency in providing, on the one hand, that a member who fails to request exclusion shall be included in the class and, on the other hand, that a member who fails to file a proof of claim shall be excluded from any recovery"

(50 F.R.D. at 60, emphasis in original), but also saw the advantages of the procedure in helping the Court to determine, among other things, the size of the class and the adequacy of the representation, 50 F.R.D. at 59-60. He balanced these competing considerations by permitting the use of the form, but ruling that members of the class "should not be barred for failure to track down this information" prior to determination of liability, 50 F.R.D. at 60.

At a later stage of the same litigation class certification was revoked, in part on the basis of information supplied in the proof of claim forms, particularly evidence of non-reliance, CCH Fed.Sec. L. Rep. ¶ 92,845 [1970-71 Transfer Binder] (S.D.N.Y. 1970). The Court of Appeals reversed, holding that "because return of the paper was optional" it could not be used to limit the class to those who responded, 456 F.2d 1206, 1211 (2d Cir 1972). The Court did not, however, criticize the use of the optional form itself, for the purposes for which it was originally intended.

The same type of notice and proof of claim, modelled expressly on Judge Mansfield's order in the Korn case, was approved in In re Cohen's Will, 51 F.R.D. 167, 175 (S.D.N.Y. 1970) (Tenney, J.) [3/] and Unicorn Field, Inc. v. Cannon Group, Inc., 60 F.R.D. 217, 227 (S.D.N.Y. 1973) (Bauman, J.); see also B & B Investment Club v. Kleinert's Inc., 62 F.R.D. 140, 150 (E.D. Pa. 1974) (proof of claim form not permitted, but Court's discretion to do so recognized); cf. Arey v. Providence Hospital, 55 F.R.D. 62, 71-72 (D.D.C. 1972) (Rule 23(b)(2) class action under civil rights laws).

The Court, then, has ample discretion to permit the use of the voluntary proof of claim form. We respectfully sub-

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3/ The Cohen case also reached the Court of Appeals, after judgment on the merits for defendants, but the use of the voluntary proof of claim form was not in issue on appeal, Cohen v. Franchard Corp., 478 F.2d 115 (2d Cir. 1973).

mit that this procedure would have important advantages in this litigation.

1. First, as discussed in the affidavit of Paul R. Koepff, Esq., sworn to September 16, 1976, and submitted herewith, neither the class representatives nor the defendants at present have any reliable basis for estimating the size of the class or the amount of damages claimed. While maximum numbers can perhaps be estimated, their usefulness is limited, and these difficulties are increased by the inclusion in the class of an indeterminate number of purchasers who sold their Franklin securities within the class period. Judge Judd declined to exclude these persons from the class, but noted that "[i]f there is any recovery or settlement, the effect of sales during the class period may be considered in fixing the amount of individual damages to be distributed." (Memorandum and Findings dated April 5, 1976, p. 11). More reliable numbers are essential to meaningful settlement negotiations.

2. The information called for may also be of assistance in determining whether the creation of sub-classes is appropriate, a question also left open by Judge Judd (id. at 12).

3. No additional burden or expense will be involved. The information requested is factual and easy to ascertain; most class members will have preserved this information for income tax purposes, or reported it on

their 1974 or 1975 federal income tax returns. Mailing the proof of claim form with the initial notice will also save substantial postage -- a point worth considering in a case where plaintiffs are protesting loudly about the cost of notice (see Point II, below).

II. UNLESS PLAINTIFFS PAY THE COST OF FORWARDING THE NOTICE TO CLASS MEMBERS WHOSE SECURITIES ARE HELD IN "STREET" NAME, THE NOTICE WILL NOT CONFORM TO THE REQUIREMENTS OF DUE PROCESS AND ANY JUDGMENT HEREIN WILL BE SUBJECT TO COLLATERAL ATTACK.

Defendants' proposed order includes the following provision:

> "10. All costs and expenses incurred incident to the preparation and mailing of the Notice, Request for Exclusion and Proof of Claim Form as set forth herein, including the cost of forwarding to beneficial owners by banks, brokerage firms and other institutions holding record title, shall be borne by the class representatives subject to further Order of the Court." (emphasis added) 4/

4/ In addition, if defendants prevail on paragraph 10, we would add a corresponding qualification to paragraph 5, to eliminate any possibility that the two paragraphs might be construed inconsistently. Thus, defendants' paragraph 5 includes the following sentence:

> "Subject to the provisions of paragraph 10 of this Order, any persons who may have books or records containing the names and addresses of the class members or their nominees shall cooperate with Milberg & Weiss and make available to such counsel any and all such lists or other material for inspection and copying."

If plaintiffs prevail on paragraph 10, the italicized clause would be omitted.

Paragraph 10 of plaintiffs' proposed order omits any reference to record or beneficial owners, and plaintiffs' counsel made clear at the most recent pre-trial conference that plaintiffs do not interpret their own reference to "all costs and expenses" as including the cost of forwarding the notice to class members whose securities are held in "street" name, or identifying such persons from brokers' records in order to address them directly.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179 (1974) held that

> "the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit."5/

5/ Eisen was an action alleging violation of the antitrust and securities laws by brokers effecting odd-lot transactions, and sought treble damages on behalf of some 6,000,000 odd-lot traders. After two appeals to the Court of Appeals ("Eisen I" and "Eisen II"), and a preliminary hearing in which plaintiff was found likely to prevail on the merits, the District Court ordered individual notice to some 7,000 of the approximately 2,250,000 identifiable class members, 52 F.R.D. 253, 267 (S.D.N.Y. 1971) and imposed 90% of the cost of notice on defendants, 54 F.R.D. 565, 573 (S.D.N.Y. 1972). The Court of Appeals reversed, 479 F.2d 1005, 1015 (2d Cir. 1973) ("Eisen III"), holding that members of the class who could be readily identified must be given individual notice and plaintiff must pay the cost. The Supreme Court ("Eisen IV") agreed, and in light of plaintiff's refusal to bear the cost of notice to the class as defined in his complaint, remanded with instructions to dismiss the class action as so defined, 417 U.S. at 179.

Since the cost of notice may thus no longer be imposed on defendants, plaintiffs can be relieved of the expenses of forwarding only if such expenses are assumed by the nominee holders, none of whom is a party to this action. As discussed below, it is clear that brokers will not in fact forward the notice unless reimbursed by plaintiffs, and this Court cannot consistent with due process order them to do so. The issue, therefore, is not whether the cost of forwarding will be borne by plaintiffs or by third parties; the issue is really whether a notice to record holders known to be nominees, without provision for forwarding to the actual members of the class, satisfies the notice requirements of either Rule 23 or due process. We respectfully submit that it does not.

A. NOTICE TO NOMINEES WITHOUT PROVISION FOR PAYMENT OF FORWARDING EXPENSES WILL NEVER REACH THE ACTUAL MEMBERS OF THE CLASS.

There is no basis for supposing that any broker will advance the cost of forwarding the notice to members of the class unless plaintiffs undertake to reimburse him. A dozen major brokerage firms have refused to do so in Jahre v. Rait, No. 74 Civ. 805 (E.D.N.Y.), discussed below, p. 15, and prevailing practice in this respect is codified in rules of the major stock exchanges and the National Association of Securities Dealers.

Although notices in class actions are not specifi-

cally mentioned in applicable rules and regulations, the exchanges and the NASD have made detailed provision for the transmission to their customers of proxy solicitation material, annual and interim reports and "other material being sent to stockholders" with respect to shares held in the name of the broker or its nominee. Members of the New York Stock Exchange are required to transmit proxy material, and request voting instructions, only when the person soliciting the proxies "shall furnish" the member organization among other things,

> "satisfactory assurance that he will reimburse such member organization for all out-of-pocket expenses, including reasonable clerical expenses, incurred by such member organization in connection with such solicitation."6/

The American Stock Exchange has adopted an identical rule,7/ and the Board of Governors of the National Association of Securities Dealers has interpreted Article III, Section 1 of its Rules of Fair Practice as imposing the same requirements on its members.8/ The exchanges and the NASD have approved a fee schedule for such mailings,9/ and the exchanges

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6/ Rule 451, 2 CCH N.Y. Stk. Exch. Guide ¶2451 (hereinafter cited "NYSE Guide").

7/ Rule 576, 2 CCH Am. Stk. Exch. Guide (hereinafter "Amex Guide") ¶9528.

8/ NASD Manual ¶2151.05, §2.

9/ 2 NYSE Guide ¶2465.20; 2 Amex Guide ¶9528.80; NASD Manual ¶2151.05, §5.

have even prescribed the form of bill to be used by member organizations.[10/] The same conditions are applicable, and the same fees prescribed, for forwarding annual reports to stockholders;[11/] interim financial reports; or "other material being sent to stockholders,"[12/] -- a catchall phrase which is certainly broad enough to include class action notices.

These provisions apply despite the fact that exchange members are not permitted to vote proxies on a wide variety of substantive issues without customer instructions, NYSE Guide ¶2452.11; Amex Guide ¶9529.11; see NASD Manual ¶2151.05, §1. The result is that if the person soliciting proxies makes no provision for reimbursement, the shares are effectively disenfranchised. There is thus no basis for expecting the nominees to exercise class members' right of exclusion pursuant to Fed.R. Civ.P. 23(c)(2)(A), or file proofs of claim on their customers' behalf.[13/]

10/ NYSE Guide ¶2465.30; Amex Guide ¶ 9537.30.

11/ NYSE Guide ¶2451.10; Amex Guide ¶9528.10.

12/ N.Y. Stk. Exch. Rule 465, NYSE Guide ¶2465; Am. Stk. Exch. Rule 585, Amex Guide ¶9537; compare NASD Manual ¶2151.05, §4.

13/ The question is certainly open whether a purported exercise by a broker of his customer's "opt-out" right would be valid in any event, in light of the Second Circuit's recent insistence, albeit in a different context, that "opting out of a class action, like the decision to participate in it, must be an individual decision." Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 412 (2d Cir. 1975).

B. THE SECOND CIRCUIT'S RECENT DECISION IN SANDLERS V. LEVY PRECLUDES THE IMPOSITION OF THE COSTS OF NOTICE ON PERSONS NOT PARTIES TO THIS ACTION

On the basis of the colloquy at the pre-trial conference on September 3, it appears that plaintiffs contemplate solving the problem of forwarding by coming back to this Court at a later date and requesting an order similar to one entered by Judge Weinstein in Jahre v. Rait, No. 74 Civ. 805, (E.D.N.Y. May 19, 1976), purporting to direct "any bank, brokerage firm or other nominee" to transmit the class notice to beneficial owners "and request reimbursement for mailing costs, or supply the names and addresses of such beneficial owners to Defendants' counsel, without cost." Judge Weinstein's order, however, was entered prior to the Second Circuit's decision in Sanders v. Levy, No. 75-7608 (2d Cir. June 30, 1976, not yet reported),[14/] and is now the subject of a special proceeding brought by the affected brokers, discussed below pp. 15-16. In the Sanders case, which we respectfully submit is controlling here, the Court of Appeals expressly held that the costs of notice to the class may not be imposed upon a person not a party to the class action claims.

14/ The Court of Appeals opinion in Sanders v. Levy, is summarized, but not reproduced in full text, in CCH Fed.Sec. L. Rep. ¶95,647. The slip opinion is attached hereto as Appendix A.

The plaintiffs in Sanders were stockholders of a mutual fund who brought both class and derivative claims against the Fund's directors and investment adviser. The Fund itself was joined as a nominal defendant for purposes of the derivative claims only; no class claims were asserted against it (slip op. at 4583). The District Court held the class claims maintainable as such under Rule 23(b)(3) and directed that individual notice be given to the stockholders comprising the class. The names and addresses of the class members, however, were stored on magnetic tape, and could only be extracted from the list of all the Fund's shareholders by the design of new computer programs at a cost in excess of $16,000 (slip op. at 4579). The District Court imposed this cost on the Fund.

The Court of Appeals reversed, holding that because the Fund was not a party to the class action claims, it was "totally improper to impose costs on the Fund." Whatever equities might favor the Fund's sharing the costs in a derivative suit brought on its behalf - a question apparently still open after the Eisen case[15/] -- the Court held that

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15/ See 417 U.S. at 178, note 15; see also 479 F.2d 1005 at 1009, note 5. (2d Cir. 1973).

> "Since the Fund has no direct interest in the outcome of the class actions claim, it is too remotely involved to have notification costs imposed upon it."

(slip op. at 4583).[16/] The non-party banks and brokers whose customers comprise the class in this case are not even as "remotely involved" as the mutual fund in Sanders; they are not "involved" at all, and requiring them to shoulder the costs of plaintiffs' lawsuit would be outrageous.

The question has arisen in three recent District Court cases, none of which provides any support for plaintiffs' position.

In Jahre v. Reit, p. 13, supra, banks and brokers requested compensation in advance for the costs involved in transmitting a notice of settlement to their customers. The defendants then obtained an ex parte order directing

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16/ Cf. Wolfson v. Solomon, 64 F.R.D. 399 (S.D.N.Y. 1974), in which the class representatives sought to have the cost of notice paid out of a settlement fund being created by certain defendants pursuant to a consent order in a related SEC enforcement action. Judge Gurfein held that he had no power to order any such invasion, in part because the issue had not been raised at the time the defendants involved had consented to create the fund. The significance of that holding is that, although the person to whom plaintiff sought to shift the burden was before the Court as a defendant, the Court found itself without power to order it to disburse funds in a different capacity. A fortiori there can be no such power where, as here, the persons who would be required to bear these expenses are not before this Court in any capacity.

the nominees "immediately" to transmit the material to the beneficial owners. Even this order did not purport to impose the entire cost of forwarding on the nominees; rather, they were permitted to "request reimbursement for mailing costs or supply the names and addresses of such beneficial owners to Defendants' counsel, without cost," No. 74 Civ. 805, Order dated May 19, 1976, emphasis added. Thereafter, on July 16, 1976 -- two weeks after the Sanders decision -- twelve brokerage firms commenced a special proceeding to vacate the May 19 order or, in the alternative, to modify it to provide for reimbursement of "costs and expenses incurred in identifying the beneficial owners ... and/or [sic] mailing to each such beneficial owner copies of the relevant class action documents."[17/] A hearing on this petition is presently scheduled before Judge Weinstein on September 28, 1976.

The next decision chronologically was Chief Judge Lord's unreported opinion in In re Penn Central Securities Litigation, MDL No. 56 (E.D. Pa. June 21, 1976), also cited by plaintiffs' counsel during the September 3 pretrial conference. In that litigation, notice had been given to the

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17/ In the Matter of the Order dated May 19, 1976 per the Hon. Jack B. Weinstein Purporting to Compel Various Brokerage Firms to Render Services Without Reimbursement, No. 76 Civ. 1305, (E.D.N.Y), Order to Show Cause filed July 16, 1976.

class, a hearing held, and the "global settlement" of the several class and derivative actions approved. Prior to distribution of the proceeds of the settlement, the Court ruled on applications for attorneys' fees and reimbursement of out-of-pocket expenses. A number of brokerage firms applied for reimbursement of costs they had already incurred in forwarding the class action notices to the beneficial owners of stock held in "street" name, slip op. p. 36. The Court denied this application, stating:

> "Nothing the brokers have pointed to in their brief convinces us that the class fund should bear the costs of forwarding the documents involved. Neither trade custom nor the inapposite holding of the Supreme Court in Eisen IV, supra at 179 overcomes the very obvious and common sense logic that if the brokers are to be reimbursed, it should come -- if at all -- from the individual beneficial owners involved -- not the entire class. There is simply no reason to require the entire class to pay for the choice of a few to have their stock held in street name.
>
> "We are not faced with, and do not decide, the obligation of the beneficial owner vis-a-vis the brokerage houses which held the stock in steeet name."

(slip op. pp. 37-38). To the extent that this decision is inconsistent with the Second Circuit's holding in Sanders v. Levy, supra, the law of this Circuit of course controls. The Penn Central case is in any event distinguishable in at least two important respects: First, the brokers were before the Court and there was no question of an ex parte order pur-

porting to bind non-parties. Second, the issue arose in the form of a request for reimbursement of expenses already incurred, after notice had already been given, so that the case presented no question of the adequacy of notice to the class or the binding effect of the judgment.

Those questions were involved in the next case, Weiss v. Drew Nat'l Corp., No. 75 Civ. 4816, (S.D.N.Y. July 19, 1976), in precisely the same procedural context in which they arise here: after certification of the class, plaintiff submitted an order and form of notice which sought to impose the cost of forwarding on brokerage firms, and defendants submitted a counter order which differed only in the addition of a paragraph providing for payment of these expenses by plaintiff. Judge Stewart, citing Sanders, held that plaintiff must bear these costs.[18/]

During discussion of this point at the pre-trial conference on September 3, plaintiffs' counsel attempted to distinguish the Sanders case on the ground that the costs there involved were necessary to identify record holders, whereas in our case the record holders are known. The distinction is

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18/ A copy of this unreported opinion is reproduced as Appendix B hereto. The Clerk's docket sheet in the Southern District reflects a motion by plaintiff for reconsideration, returnable Sept. 9, 1976, on which no decision has yet been handed down.

specious. The point is not whether notice is addressed to record holders or to beneficial holders, but whether it is reasonably calculated to come to the attention of the members of the class. In this case, notice limited to record holders is simply not "the best notice practicable under the circumstances" required by Rule 23(c)(2).

We expect plaintiffs to argue, as they did at the pre-trial conference, that the expense of forwarding the notice to the actual members of the class (or of ascertaining their names and addresses from brokers' records) will be substantial, and that requiring the class representatives to assume it will discourage persons with small claims from bringing class actions. This same argument was forcefully advanced in the Eisen case (see, in particular, the vigorous dissent of Judge Oakes in Eisen III, 479 F.2d at 1024-25) and expressly rejected by both the Second Circuit and the Supreme Court. It must similarly be rejected where, as here, it is advanced in an effort to have plaintiffs' claims subsidized by innocent third parties.

Due process considerations aside, the notion that class actions should be subsidized by strangers is so obviously unjust that it need not be belabored. In the absence of power to compel non-party banks and brokers to bear the

cost of forwarding notice to class members, there are only two alternatives: either plaintiffs must bear such costs, as provided in defendants' proposed order, or the notices will not be forwarded to members of the class. In the latter case, notice will be constitutionally insufficient and this action must be dismissed as a class action.

C. NOTICE TO NOMINEES, WITHOUT PROVISION FOR FORWARDING TO THE ACTUAL MEMBERS OF THE CLASS, IS NOT "THE BEST NOTICE PRACTICABLE UNDER THE CIRCUMSTANCES" WITHIN THE MEANING OF RULE 23(c)(2).

Rule 23(c)(2) provides:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." (emphasis added).

The Advisory Committee Note states what is obvious from the literal language of the Rule:

> "This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject."

Advisory Committee Note to revised Rule 23, 39 F.R.D. 69, 107 (1966) (citations omitted). Adequate r tice is in short, crucial to the whole concept of Rule 23(b)(3) class actions. Professor Moore explains why:

> "it should be remembered that the (b)(3) class of members is apt to lack cohesion, the members may run into thousands -- even millions, and be scattered over the globe, their nominal representative is a self-appointed representative and their real representative is a lawyer chosen by the self-appointed representative, and yet a judgment rendered in the action is to be binding upon all members of the class, who do not request exclusion by a specified date." (footnotes omitted)

3B Moore, op cit. supra, ¶23.55; see also Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 45 (1967).

In this context it cannot be seriously argued that the exercise of sending notice to persons known to be nominees, without provision for forwarding, can be deemed "the best notice practicable under the circumstances." Rule 23(c)(2) expressly requires "individual notice to all members who can be identified through reasonable effort," and the Supreme Court has emphasized that this is an absolute requirement, "not a discretionary consideration to be waived in a particular case," Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974).

"Reasonable effort" to identify class members clearly requires consulting records of the brokerage firms through which they purchased; this very procedure was involved in the Eisen case itself. Of the 6,000,000-member class in that case, the

2,250,000 members whom the Supreme Court held entitled to individual notice at plaintiff's expense were identified by means of computer records of the brokerage firms through whom their orders were placed.[19/] The District Court was at pains to point out that notice to banks and brokers "by itself ... would be far from satisfactory," 52 F.R.D. at 267, emphasis added. This is hardly a novel concept. Long before Eisen, it was the established practice to require class representatives to identify the members of the class at their own expense. For example, in Berland v. Mack, 48 F.R.D. 121, 133 (S.D.N.Y. 1969), Judge Mansfield directed that "within 10 days after receipt of a stockholder list from the defendant corporation,

> "plaintiffs' counsel will, at plaintiffs' expense, mail to each identifiable brokerage house on such list a written communication to the effect that the Court has directed that such brokerage concern furnish to plaintiffs' counsel the names and addresses of all persons for whom it acquired GAI common shares during the period from March 21, 1966 to April 29, 1966, and the number of shares acquired for each. In the event of refusal or failure on the part of any brokerage concern to furnish the required information within two weeks after transmittal of the notice to it, plaintiffs' counsel may secure from this Court a subpoena duces tecum addressed to such concern.

19/ Two million of them were customers of fourteen brokerage firms which effected odd-lot transactions by teletype; the remaining 250,000 invested through "monthly investment plans" or payroll deduction plans of NYSE member firms from whose records they could be identified, 52 F.R.D. at 257-58.

> "Upon receipt of the information requested from the brokerage concerns, and not later than 30 days after receipt of the initial list from GAI, plaintiffs' counsel, at plaintiffs' expense, will transmit a copy of the notice by first class mail to each identifiable member of the class."

(Emphasis added.) This procedure was approved as "a useable model" in In re Memorex Security Cases, 61 F.R.D. 88, 103 (N.D. Cal. 1973), where plaintiffs had expressed their willingness to pay the costs involved, and utilized in B & B Investment Club v. Kleinert's Inc., 62 F.R.D. 140, 145 (E.D. Pa. 1974), where they had not. See also Herbst v. Able, 47 F.R.D. 11, 17 (S.D.N.Y. 1969), modified on other grounds, 49 F.R.D. 286 (S.D.N.Y. 1970).

In the District Court cases cited, no one was arguing, as plaintiffs are here, that the cost of identifying the class members should be borne by someone other than the class representatives. The issue in all three cases was what was the best notice practicable under the circumstances and all three district judges required individual notice to all beneficial owners who could reasonably be identified. The force of those holdings is not diminished by plaintiffs' introduction of the cost issue, for the issue is not cost but the adequacy of notice.

We expect plaintiffs to argue, in their simultaneous brief, that requiring them to pay the cost of forwarding (or of identifying the brokers' customers in order to mail to them directly) would be "unreasonable" effort, and that they should not be required to look beyond the transfer sheets to identify class members. This argument is nothing more than a variation on the reasoning on which the District Court in Eisen ordered individual notice to only a small percentage of the identifiable class because individual notice to the entire class would have been prohibitively expensive. The Supreme Court rejected this reasoning:

> "The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. . . . There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs."

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974). If there were any residual doubt about the applicability of this holding in the context of identifying the persons to whom notice must be given, it has now been removed by the Second Circuit's decision in Sanders v. Levy, pp. 13-15 supra. After reiterating that the amount of expense involved is "an inappropriate consideration in the determination of the incidence of notice costs," slip op. at 4585, the Court made clear that "the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing

the notice and procuring, stuffing and posting the envelopes," id. at 4587.

Any other result would undermine the whole structure of Rule 23(b)(3) class actions, for if the form of notice employed is not reasonably calculated to reach the persons affected, they will not be bound by the judgment. Indeed, as one court has noted, defective notice which opens the judgment to collateral attack is in effect a return to the "one-way intervention" procedure which the 1966 revision of Rule 23 was intended to reverse, see Philadelphia Elec. Co. v. Anaconda Amer. Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968). In Greenfield v. Villager Industries, Inc., 483 F.2d 824 (3d Cir. 1973), settlement of a class action was overturned on appeal after distribution had been effected because requests for exclusion were required to be filed within 30 days of notice by publication, and the District Court denied the applications of two brokers, not parties to the action, for an adjournment of the hearing in order to solicit their customers who were class members. The Court of Appeals for the Third Circuit stressed the key significance of adequate notice to the constitutionality of the whole class action procedure:

> "A procedure such as the class action, which has a formidable, if not irretrievable, effect on substantive rights, can comport with constitutional standards of due process only if there is a maximum opportunity for notice to the absentee class member, i.e., '[T]he best notice practicable under the circumstances including individual notice. . . .'

> "Given that class action procedures are conceptualized as an exception to the general rule that only parties to a lawsuit are legally bound by a final judgment, and that interested parties normally have a real voice in the strategy and management of the litigation, the procedure can be tolerated, if not completely justified, only if there is fealty to both the spirit and the letter of the procedural rules, especially those relating to notice. Responsibility for compliance is placed primarily upon the active participants in the lawsuit, especially upon counsel for the class, for, in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court. The ultimate responsibility of course is committed to the district court in whom, as the guardian of the rights of the absentees, is vested broad administrative, as well as adjudicative, power.
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> "Not the least important of the fiduciary duties shared by counsel and the court is their duty to ensure that absentee class members have knowledge of proceedings in which a final judgment may directly affect their interests."

483 F.2d at 831-32, footnotes omitted.[20/]

20/ Nor can the Greenfield case be distinguished on the ground that it dealt with notice by publication. The notice in that case (which did actually come to the attention of the non-party brokers who were the appellants - the same persons to whom plaintiff herein would effectively limit notice, albeit by different means) was legally insufficient, not merely because it was by publication (which the Court also criticized) but the fact that it was not "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," 483 F.2d at 832, quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Class members whose names and addresses can be obtained from the brokers through whom they purchased can, then, be "identified through reasonable effort" and are accordingly entitled to individual notice of the pendency of this suit. Unless such notice is given, any judgment herein will be vulnerable to collateral attack as entered without due process. In the face of such a prospect, any chance of settlement becomes remote. The social utility of the cumbersome and expensive class aciton device in such circumstances is minimal, and the cost, in a case such as this, is extraordinary. If plaintiffs are unable or unwilling to bear the cost of the notice sufficient to make any judgment herein binding on the class, their representation of the class is plainly inadequate and this action should not be allowed to proceed as a class action.

CONCLUSION

Defendants' proposed order should be entered.

Dated: New York, New York
September 17, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 743, 744, 745—September Term, 1975.

(Argued May 5, 1976 Decided June 30, 1976.)

Docket Nos. 75-7608, 75-7610, 75-7611

IRVING SANDERS,

Plaintiff-Appellee,

—against—

LEON LEVY, et al.,

Defendants-Appellants.

EGON TAUSSIG,

Plaintiff-Appellee,

—against—

SIDNEY M. ROBBINS, et al.,

Defendants-Appellants.

MICHAEL SHAEV and RITA SHAEV,

Plaintiffs-Appellees,

—against—

ERIC HA[illegible], et al.,

Defendants-Appellants.

4577

Before:

HAYS and MULLIGAN, *Circuit Judges,* and
PALMIERI, *District Judge.**

Appeal from an order of the Hon. Thomas F. Griesa, *Judge,* United States District Court for the Southern District of New York, holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., and directing that the defendant mutual investment fund bear substantial costs of extracting the names and addresses of the class members from computer tapes.

Affirmed as to class action designation. Reversed as to allocation of identification costs.

GERALD GORDON, New York, New York (Weisman, Celler, Spett, Modlin & Wertheimer, New York, New York, Milton C. Weisman of Counsel), *for Defendant-Appellant Oppenheimer Fund, Inc.*

LEON H. TYKULSKER, New York, New York (Guggenheimer & Untermyer, New York, New York, Richard P. Ackerman, of Counsel), *for Defendants-Appellants Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash.*

JOHN F. DAVIDSON, New York, New York (Thacher, Proffitt & Wood, New York, New York, Daniel E. Kirsch, of Counsel), *for Defendants-Appellants Edmund T. Delaney and Emanuel Celler.*

* Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

DONALD N. RUBY, New York, New York (Wolf Popper Ross Wolf & Jones, New York, New York, Robert Kornreich, of Counsel), *for Plaintiffs-Appellees.*

PALMIERI, *D. J.:*

Plaintiffs-appellees (plaintiffs) seek to maintain this action on behalf of certain present and former stockholders of Oppenheimer Fund, Inc. (the Fund), an investment company registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* This is an appeal under 28 U.S.C. § 1291 from an interlocutory order holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., and directing the defendant-appellant (defendant) Fund to bear substantial costs in identifying the names and addresses of the class members so that plaintiffs can send them the initial notice of the pending action as required by Rule 23(c)(2), Fed. R. Civ. P.

When the motion for class determination was made, there were over 67 million shares of the Fund outstanding held by approximately 173,000 shareholders. Of the approximately 121,000 present or former shareholders who constitute the class designated by the plaintiffs, about 103,000 remain shareholders and 18,000 have sold their shares. The information needed by plaintiffs for the preparation of the notice to the members of the class, particularly the names and addresses of the class members, is contained in magnetic computer tapes kept by the transfer agent of the Fund. The extraction of this information from the tapes would require, in addition to the usual processing, the design of new computer programs. The cost of accomplishing this task was estimated by the transfer agent to be $16,580 as of October 10, 1973.

On each of the issues presented, identification costs and designation as a manageable class action, we must first decide if the issue is reviewable on appeal and, if so, then determine if the district court's decision should be upheld. Since we find that our treatment of the identification costs matter affects the designation question, we discuss the identification costs matter first.

The Allocation of Identification Costs

The order requiring the Fund to bear the identification costs is appealable because it fits squarely within the collateral order doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). The requirements of that doctrine are essentially twofold: first, the decision appealed from must not be "tentative, informal or incomplete," 337 U.S. at 546, but rather it must conclusively settle a party's claim; second, the decision must involve a collateral matter that can be reviewed apart from the merits of the case but which cannot be effectively reviewed on appeal from the final judgment. In *Eisen* v. *Carlisle & Jacquelin (Eisen IV)*, 417 U.S. 156 (1974), the Supreme Court faced the question whether this court had jurisdiction in *Eisen* v. *Carlisle & Jacquelin (Eisen III)*, 479 F.2d 1005 (2d Cir. 1973) when we reviewed the district court's order imposing notice costs on the defendants. The Supreme Court decided that the order was appealable because it was "'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.'" 417 U.S. at 172, *quoting Cohen, supra*, 337 U.S. at 546-47. *See also, General Motors Corp.* v. *City of New York*, 501 F.2d 639, 647 (2d Cir. 1974). We find this question of appealability controlled by *Eisen IV*.

We turn next to the merits of the order allocating identification costs. Rule 23(c)(2), Fed. R. Civ. P., provides in relevant part:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

Since this is a class action brought under subdivision (b)(3) of the rule, namely, one in which the court below found that the questions of law or fact common to the members of the class predominate over any questions affecting only the individual members, and that the class action was superior to other available methods, individual notice of the action must be sent to all class members who can be identified by name and address through a reasonable effort. *Eisen IV*, 417 U.S. at 173-77. The cost of such notice must be borne in the first instance by plaintiff. *Id.*, 417 U.S. at 177-79; *Eisen III*, 479 F.2d 1005, 1009 (2d Cir. 1973); *Eisen II*, 391 F.2d 555, 568 (2d Cir. 1968). The authorities just cited enunciate the views of the Supreme Court and this court that, absent special circumstances, if the plaintiff does not accept this expense, the class action cannot be maintained. In the usual case, defendants may not be compelled to provide financial support for a class action against themselves.

> Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as a part of the ordinary burden of financing his own suit.

Eisen IV, 417 U.S. at 178-79.

The possibility that plaintiff may not be required to defray the cost of notice is still an open question in some

cases. The Supreme Court declined to foreclose the possibility in "situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit." *Eisen IV, supra,* 417 U.S. at 178. In addition to the derivative suit, we have suggested that there may be other similar cases in which justification might be found for holding that a representative plaintiff is not obligated to defray the cost of notice, citing "a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund." *Eisen III,* 479 F.2d 1005, 1009 n.5 (2d Cir. 1973). The district judge does not appear to have pursued this line of analysis and the plaintiffs have mentioned it only in passing.

Assuming that there may be cases where the imposition of notification costs on the defendant may be justified, we do not think this is such a case. The defendant Fund is not a public service monopoly with the responsibilities incumbent upon such an entity, and no finding of liability has yet been entered against it. The Supreme Court in *Eisen IV* did not attempt to elucidate the exceptional case in which a representative plaintiff might be relieved of this burden. Indeed, it did not unequivocally state that there was such a case. It did speak of the shareholder derivative suit but that apparently was by way of analogy since the derivative suit is not a class action, though possibly akin thereto.[1] The Supreme Court also described *Eisen IV* as a case where "the relationship between the parties is truly adversary." 417 U.S. at 178. Possibly this was intended to contrast it with a derivative suit where the corporation, though a nominal defendant, has interests

1 See *Developments in the Law, Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 943 (1958); Meyer, *The Social Utility of Class Actions,* 42 BROOKLYN L. REV. 189, 190-91 (1975).

closely aligned with the plaintiff and indeed would be the beneficiary of any recovery. The equities in favor of imposing some costs on the corporation in that situation are obvious. But the Supreme Court more likely had in mind an arms-length relationship unencumbered by fiduciary duties. The relationship between the plaintiffs and the Fund is probably not "truly adversary" in the *Eisen IV* sense. Although the Fund is not in the position of the corporation in a derivative suit,[2] we may assume it had fiduciary duties to the purchases of its shares. See *Dolgow v. Anderson*, 43 F.R.D. 472, 498-99 (E.D.N.Y. 1968). But the relationship between the plaintiffs and the Fund is not non-adversarial in a manner which requires an exception to the *Eisen IV* rule on notification costs, but in a manner that makes it totally improper to impose costs on the Fund: the Fund is not a party to the class action claims.[3] No recovery is sought from the Fund in the class action. The plaintiffs have been careful to exclude the Fund itself from all allegations of wrong-doing and to seek recovery only from its directors, its managing company and the broker-dealer firm that controls the manager. Indeed, the Fund appears to have been named as a defendant only for purposes of the derivative claims which are not of concern here. Since the Fund has no direct interest in the out-

2 Each of the three consolidated suits contains two counts—one a derivative and one a class action. The order on appeal deals only with the latter, and we are not here concerned with the derivative claims. Furthermore, the Fund would not directly benefit from a recovery by the plaintiffs.

3 The dissent apparently overlooks the fact that the costs were imposed on the Fund which is not a party to the class action claims. *Eisen IV*, *supra* at 178, makes an exception to the usual rule that the representative plaintiff must bear the cost of notice "where a fiduciary duty pre-existed between the *plaintiff* and *defendant* . . ." (emphasis added). We may not assume that non-class member shareholders would approve of the Fund underwriting these expenses for the benefit of other shareholders.

come of the class action claim, it is too remotely involved to have notification costs imposed upon it.

Furthermore, we do not think these costs could properly be imposed on the other defendants. Even if we assume that these defendants—the directors of the Fund, its manager, and the firm that controlled the manager—had fiduciary duties to the plaintiff shareholders, that would be insufficient in our opinion to warrant imposition of notification costs on them on the facts of this case. Many of the considerations pointed to in justification for shifting the costs, see *Dolgow* v. *Anderson, supra,* 43 F.R.D. at 498-500; *Eisen* v. *Carlisle & Jacquelin,* 52 F.R.D. 253, 264-70 (S.D.N.Y. 1971), have been shown to be inappropriate. The district court may not weigh the merits and cite the strength of a plaintiff's case as justification.[4] The result in *Eisen IV* leaves no doubt that the ability of a defendant to bear the costs and the fact that, if it does not, the suit will have to be discontinued, are to be given little or no weight. The public interest in enabling the adjudication of claims that could not be maintained in any other form and in having remedial statutes enforced is sharply offset by the danger, all too frequently realized, of large settlements paid irrespective of the merits of the claim in order to avoid the disastrous ex-

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4 We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

Eisen IV, supra, 417 U.S. at 177. We have stated the matter more broadly:

> But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law.

Eisen III. supra, 479 F.2d at 1015.

penses of litigation. *Eisen III, supra,* 479 F.2d at 1019. Even the contention that the defendant has an interest in obtaining the effects of res judicata against all members of the class often rings untrue. If the class action proceeds, the defendant may pay large sums in defending claims that might not otherwise have been brought due to the limited interest of the individual plaintiffs.[5] In sum, we perceive no special circumstances in this case that would warrant shifting the costs of notification from the plaintiffs to any of the defendants. We have suggested before that the vindication of valid class claims not maintainable under Rule 23(b)(3) or otherwise is a matter for Congress. *Eisen III,* 479 F.2d at 1019.

The justification that the district court found for imposing some costs on the defendant Fund was twofold. First, it found the expense was "relatively modest," apparently in relation to the assets of the Fund which exceeded $500,000,000. This is an inappropriate consideration in the determination of the incidence of notice costs, even if the costs force the plaintiffs to discontinue as in *Eisen IV.* The second reason given was that "it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." This bears some analysis. Plaintiffs defined the class as all persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970. Discovery then revealed that this class consisted of approximately 121,000 persons, 103,000 of whom were still Fund shareholders, and that the cost of the required computer operations to extract the names and addresses of the class members from the lists of past and present Fund shareholders would

5 *See* Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement,* 29 MD. L. REV. 139, 155 (1969). This is true of the instant case where the interests of the class members are said to range from $2.00 to $24.00.

be approximately $16,580. Plaintiffs then sought to redefine the class to exclude the 18,000 persons included in the original class who no longer hold Fund shares, and to send the required notice by inserting it in a regular mailing to all present Fund shareholders. The defendants objected to the exclusion of the 18,000 persons, presumably because it would limit the res judicata effect of the suit. The district court reached the same conclusion but for a different reason, holding that these persons could not be excluded because to do so "would involve an arbitrary reduction in the class." [6] The class as originally defined was found to constitute the proper class for reasons unrelated to the interests of the defendants. It would thus be inconsistent to say that it is a proper class only if the defendants pay the costs. The two issues are distinct.

The defendants also opposed sending the notice to the 68,000 shareholders who are not class members, expressing concern that such a mailing could lower investor confidence and trigger a wave of redemptions. The district court did not pass on the validity of this concern; it merely noted that the concern was obviated by having the defendant cull the non-members from the lists. However, there is evidence in the record to substantiate the concern. Plaintiffs assert that the Fund shareholders have been advised of the nature and pendency of this suit 13 times since 1970 in proxies, prospectuses and annual reports. But we think that notice of that type—usually several paragraphs in a footnote written by management and with a strong denial of merit—would have a far milder impact than a separate communication (though mailed with other papers) composed by the

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6 The court found: "If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares."

plaintiffs, giving a detailed explanation of the claims and without a denial of merit, particularly when the latter portends the imminent prosecution of a matter which the steady flow of prior notices had indicated was dormant if not defunct. In these circumstances, we think that the defendants concern was legitimate and the district court could not properly condition its abatement on defendants' shouldering of the notice costs. The identification costs cannot be viewed as additional expense necessitated by unreasonable or partisan demands on the part of the defendants.

Plaintiffs attempt to distinguish *Eisen III* and *Eisen IV* by asserting that the cost of identifying the members of a class is not a part of notifying those members. They further suggest that identification costs are akin to the expense borne in discovery which a district judge may in his discretion require a party to bear unless the party can show that it is unreasonable and oppressive, citing, *inter alia,* 8 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2218 at 659 (1970), and 4A J. Moore, *Moore's Federal Practice* ¶ 33.20 (2d ed. 1975). However, we are of the opinion that the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes. Moreover, if the rules of discovery were applicable, it appears unlikely that they would require that defendants bear the identification costs here. Rule 33(c), Fed. R. Civ. P., designed to protect parties from burdensome interrogatories, provides:

> (c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business

> records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Under this rule, a party will not be required to perform burdensome extraction of information from sources that are available to the party seeking discovery. *See* 4A J. Moore, *Moore's Federal Practice* ¶ 33.20 at 33-103 (2d ed. 1975); *Tytel* v. *Richardson-Merrell, Inc.*, 37 F.R.D. 351 (S.D.N.Y. 1965); *Konczakowski* v. *Paramount Pictures, Inc.*, 20 F.R.D. 588 (S.D.N.Y. 1957). If the discoverer should proceed under one of the other rules governing discovery, the respondent could obtain a protective order under Rule 26(c) from "undue burden or expense." Nevertheless, we do not rely on this point since we find the discovery rules inapplicable.[7]

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7 Our dissenting Brother sees Rule 34 as "more specifically designed to govern computerized information." This rule addresses itself to the *production* of data compilations for inspection or copying, not to the sorting or analysis of the data. Although the rule provides that the data compilation may be "translated, if necessary, by the respondent through detection devices into reasonably usable form," the concern appears to focus on putting the data into a form intelligible to the discoverer so he can then study or employ it. As the Advisory Committee Note to the 1970 amendment states,

> "[W]hen the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a *print-out* of computer data."

48 F.R.D. at 527 (emphasis added). The task of culling relevant

The Class Action Designation

We turn next to the designation of the suit as a class action. The determination of the district court that the action met the requirements of Rule 23(b)(3) was discretionary. It is not appealable under the collateral order doctrine. In seeking to arrive at some standards by which to determine the appealability of such an order, we have developed a three-pronged test as set forth in *Herbst* v. *International Telephone & Telegraph Corp.*, 495 F.2d 1308, 1312 (2d Cir. 1974), and refined in *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974), *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974) and, most recently, in *Parkinson* v. *April Industries Inc.*, 520 F.2d 650 (2d Cir. 1975). *See also, Handwerger* v. *Ginsberg*, 519 F.2d 1339 (2d Cir. 1975). In *Parkinson*, we recognized the "renewed emphasis on the policies of finality" and indicated that only in "extraordinary circumstances" would exceptions to the final judgment rule be permitted. 520 F.2d at 657-58. Although it may be a close question whether that three-prong test is satisfied here, we do not decide that question. We think we may properly review the class action designation because the order in which it was made is properly before us on another ground. Judge Friendly, in his concurrence in *Parkinson, supra*, 520 F.2d at 660, suggested that this exception should be made even if appeals from the grant or denial of class action designation are allowed only under the certification procedures of 28 U.S.C. § 1292(b). There is sufficient overlap in the factors relevant to both

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names and addresses from a long list, as confronts the parties here, is a distinctly different one from the production for inspection and copying with which Rule 34 is concerned. If "sophisticated electronic manipulation and analysis" become necessary, "the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets." 8 C. Wright and A. Miller, Federal Practice & Procedure § 2218 at 659 (1970).

issues to warrant our exercising plenary authority over this appeal. *Eisen IV, supra,* 417 U.S. at 172; *Hurwitz* v. *Directors Guild of America, Inc.,* 364 F.2d 67 (2d Cir.), *cert. denied,* 385 U.S. 971 (1966). *See San Filippo* v. *United Bhd. of Carpenters & Joiners,* 525 F.2d 508 (2d Cir. 1975); *General Motors Corp.* v. *City of New York,* 501 F.2d 639, 648 (2d Cir. 1974); 9 J. Moore, *Moore's Federal Practice* ¶ 110.25[1], at 272-73 (2d ed. 1975).

Turning to the merits of the class action designation we find that the granting of class action status was proper. As Judge Griesa found, the requisite numerousness is present and common questions of law and fact predominate over any questions affecting only the individual members of the class. Moreover, we cannot, at this stage of the litigation, support defendants' claim of unmanageability. They contend that proof of liability and damages "may well involve millions of individual computations," and that the aggregate damages sustained by the class may not be as great as plaintiffs claim. Nevertheless, the district judge is in the best position to make a determination of manageability and has considerable discretion in doing so. Modern computer technology can bring formerly insurmountable tasks within the range of manageability. If, on the other hand, unmanageability should develop or facts should arise which indicate that class treatment is inappropriate, the district judge can reassess the procedures to be employed and can even reconsider the class action designation. *Parkinson* v. *April Industries, Inc., supra,* 520 F.2d at 653; *General Motors Corp.* v. *City of New York, supra,* 501 F.2d at 647; *Green* v. *Wolf Corp.,* 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969); Rule 23(c)(1), Fed. R. Civ. P. Judge Griesa specifically noted that his determination was a provisional one.

Accordingly, we affirm the provisional designation of the suit as a class action but reverse the order imposing on the defendant Fund the costs of extracting from computer tapes the names and addresses of the class members.

HAYS, *Circuit Judge* (dissenting in part):

I concur in the majority's holding that the order below is appealable and the granting of class action status proper. I respectfully dissent, however, from the reversal of the district court order directing defendant Oppenheimer Fund, Inc. ("the Fund") to cull out the names of class members from the Fund's computer tapes at the Fund's expense. The majority's decision, ostensibly predicated on the Supreme Court's decision in *Eisen* v. *Carlisle & Jacquelin (Eisen IV)*, 417 U.S. 156 (1974), uncritically treats a discovery issue as notice and indiscriminately applies a rule appropriate to arms-length relationships to the fiduciary relationship between the parties herein. An elaboration of the particular facts attending this suit is fundamental to understanding the nature of the action and my disagreement with the panel's holding.

Defendant Fund is an open-end diversified investment fund registered under the Investment Company Act of 1940, 15 U.S.C. §§80a-1 *et seq.* Defendant Oppenheimer Management Corporation ("the Manager") manages the Fund's investment portfolio and, pursuant to an Investment Advisory Agreement, receives compensation calculated as a percentage of the Fund's net asset value. Defendant Oppenheimer & Co. ("the Broker") is a brokerage firm owning approximately 82% of the outstanding stock of the Manager and 100% of the voting stock. The individual defendants are all directors of the Fund, some

of whom also hold offices or directorships or partnership interests in the Manager and/or Broker. The Manager has the right to act as exclusive distributor and sole principle underwriter of Fund shares. Shares are sold to the public at a price equal to net asset value plus a sales charge.

This consolidated suit involves stockholder derivative and class action claims. The class, as certified by the district court, is composed of all persons who purchased Fund shares between March 28, 1968 and April 24, 1970. The complaint alleges that the defendants violated the federal securities laws by failing to disclose material information to investors. The gravamen of the damage claims is that restricted securities purchased by the Fund were overvalued and, consequently, the net asset value of the Fund was overstated. Overstatement of net asset value, in turn, caused an overvaluation of Fund shares being sold to the public during the relevant period and, because the Fund-Manager fee arrangement was geared to net asset value, caused the Fund to pay inflated fees to the Manager.

As the majority apparently recognizes, the Supreme Court's *Eisen IV* decision is not dispositive of the issue of the allocation of costs of identification in the context herein. *Eisen IV* construed the *notice* requirements of Rule 23(c)(2), which apply to class actions maintained under Rule 23(b)(3), in the context of a case wherein "the relationship between the parties is truly adversary," *Eisen IV*, *supra* at 178-79, and held that "[t]he usual rule is that a plaintiff must initially bear the cost of notice to the class." *Id.* at 178. In the instant case, in contrast, we deal not with notice costs—a burden plaintiffs herein willingly assume—but with class member identification costs, and we deal not with the usual rule applicable to truly adversarial relationships, but with a rule as to

which the Supreme Court took pains to express no opinion —the rule which governs in "situations where a fiduciary duty pre-existed between the plaintiff and defendant. . . ." *Id.* Both of these distinctions merit pause before we rush to close yet another door to the class action procedure.

In *Eisen IV* the Supreme Court held that in a Rule 23(b)(3) class action the cost of notice, *i.e.*, the letter, envelope, stuffing, and postage is, in the usual case, the responsibility of the plaintiff "as part of the ordinary burden of financing his own suit." *Eisen IV, supra* at 179. The opinion properly construed requires only that the litigation expense of notice be borne by plaintiff. It does not require, and surely the Supreme Court did not intend, that *all* litigation expenses, contrary to established rules and practice, are to be hereinafter the plaintiff's responsibility. When identification is sought information allowing a party to proceed with his suit is at the core of the request. Thus, in purpose and effect such a request is not different in kind from other requests for information routinely made during discovery. That a suit will be unable to proceed absent identification does not vitiate the validity of characterizing identification as a product ascertainable by discovery and governed by the rules applicable thereto. A contrary view clearly is belied by the common practice of establishing jurisdiction by means of discovery.

Rule 34 governs the production of computerized information, making discoverable, *inter alia*, "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form. . . ."[1] As noted by 8 C.

1 It is somewhat disingenuous to focus, as the majority does, on Rule 33 which governs interrogatories rather than the Rule more specifically designed to govern computerized information. Since the disclosing party has opted to keep his records on computer tapes, there is good

Wright and A. Miller, Federal Practice and Procedure §2218 at 659 (1970):

> "The responding party who is required to prepare a printout or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to the discovering party only on a showing under Rule 26(c) that justice so requires in order to protect himself from 'undue burden or expense.'" (footnote omitted)

While the authors suggest that courts should be sensitive to the expense involved since the disclosing party may be obliged "to engage in fairly sophisticated electronic manipulation and analysis," *id.*, expense remains an issue properly resting within the sound discretion of the district judge. Under the facts of this particular case the district judge did not consider the costs of processing the defendant's tapes an "undue burden or expense." It is not our practice to disturb the discretionary judgment of a district court in the realm of discovery absent a showing of abuse, *see, e.g., Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *H.L. Moore Drug Exchange, Inc.* v. *Smith, Kline & French Laboratories*, 384 F.2d 97 (2d Cir. 1967), and discovery of class members should provide no exception. Imposing the cost of culling out the names of members of the class upon the Fund involved no abuse of discretion. The district court, finding this expense attributable to defendants' objections to plaintiffs' efforts to define a subclass minimizing expenses, *cf. Eisen IV, supra* at 179, n.16, did not

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reason to allow the district court the usual discretion as to costs of retrieving information from those tapes lest discovery be obstructed by irretrievably burying information to immunize business activity from later scrutiny.

commit reversible error in refusing to shift this burden to plaintiffs. Moreover, the order below specifically notes that it is "without prejudice to the right of this defendant [the Fund], at the conclusion of the action, to make whatever claim it would be legally entitled to make regarding reimbursement by another party."

Assuming, *arguendo*, that the majority is correct in failing to distinguish identification from notice, reversal of the district order is neither compelled by *Eisen IV* nor an advisable extension of that case. As we noted in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1009 n.5 (2d Cir. 1973)[2] *("Eisen III")* and the Supreme Court noted in *Eisen IV*, the usual rule that the representative plaintiff must bear the cost of notice may not apply "where a fiduciary duty pre-existed between the plaintiff and defendant. . . ." *Eisen IV, supra* at 178. The instant appeal squarely raises the issue, heretofore undecided, of whether notice costs may properly be imposed upon a defendant

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2 The footnote, in pertinent part, states:

"Nor did we decide or intend to say [in *Eisen II*, 391 F.2d 555 (2d Cir. 1968)] that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Exchange Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration. It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. See Advisory Committee's Note, 39 F.R.D. 69, 107."

when the relationship of the parties is truly fiduciary. I would hold that they may.

Unquestionably the relationship between Fund shareholders and the defendants herein is of a fiduciary nature. As one court has observed, the Investment Company Act "impose[s] fiduciary obligations of the highest order upon persons who control investment companies." *Securities and Exchange Commission* v. *Advance Growth Capital Corp.*, 470 F.2d 40, 55 n.21 (7th Cir. 1972). *See,* Investment Company Act of 1940, 15 U.S.C. §80a-35. So too, "[t]he Investment Advisors Act of 1940 . . . reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship. . . .'" *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963), *quoting* 2 Loss, Securities Regulation (2d ed. 1961) at 1412. It is the breach of these fiduciary duties which is at the core of this suit.

When the defendants assumed their positions with the Fund they knew, or clearly should have known, that the law imposes very strict standards upon their conduct. Their relationship to the plaintiff class is one of trust; the entire scheme of our investment company and advisor regulation is predicated upon that trust being respected inviolate. A breach of a fiduciary duty traditionally has been considered a much graver transgression than, for example, breach of a contractual duty. Thus, as the majority notes, the Supreme Court in *Eisen* "refused to foreclose the possibility" of allocating notice costs where there exists a fiduciary duty between the parties and their relationship is not truly adversarial. Absent such a special relationship and without support under Rule 23, the Supreme Court found no justification for deviating from the usual rule that a plaintiff must bear notice costs. In cases involving fiduciaries, however, the usual rules traditionally have been modified to insure that the trust

relationship is not abused. The norms appropriate in the context of arms-length bargaining are simply inapposite in the fiduciary context. Thus, the usual rule should not apply to preclude class action when to do so creates a serious potential for insulating fiduciary breaches from redress. I would affirm the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STELLA WEISS, :

Plaintiff, :

-againts : 75 Civ. 4816

DREW NATIONAL CORPORATION, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

44784

M E M O R A N D U M

STEWART, DISTRICT JUDGE:

In a memorandum decision of May 28, 1976, we granted plaintiff's motion for certification of this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure ("F.R.Civ.P."). As instructed in that opinion, plaintiff has submitted a proposed form of notice for the class members. Defendants do not object to the form of notice but challenge plaintiff's order insofar as plaintiff seeks to have brokerage firms bear the expense of either forwarding the notice to the class members or of forwarding a written list of names and addresses of the beneficial owners of stock to plaintiff's attorney. [Greenwald Affidavit of July 7, 1976]. Defendants have submitted a counterorder which differs from plaintiff's proposed order only in the addition of a paragraph which

requires plaintiff to bear the expense incurred by third parties whose cooperation is needed in order to identify lass members.

In a recent discussion of the question of the costs of notification of class members in a Rule 23(b)(3) class action, the Second Circuit held that "[t]he costs of . . .notice must be borne in the first instance by plaintiff." Sanders v. Levy, slip op. 4577, 4581 (2d Cir. June 30, 1976). While the court in Sanders reached this conclusion when reviewing an allocation of costs between plaintiff and defendant, we believe that its determination is application to the situation here. Thus, we hold that plaintiff, and not the brokerage firms, must bear the cost of notifying class members.

Therefore, the court having ordered on May 28, 1976 that this action be certified as a class action on behalf of all persons other than defendants who purchased common stock of Drew National Corporation during the period of January 2, 1971 to January 9, 1975, and counsel for the plaintiff Weiss having circulated among all counsel in the consolidated action the annexed form of Notice to Class Members of Pendency of Class Action, and no counsel having objection thereto, it is

ORDERED that the annexed Notice to Class Members of Pendency of Class Action be given to the class members at the expense of plaintiff by said notice being published once

in the national edition of The Wall Street Journal and mailed by first class, postage paid, letter to each identifiable class member as ascertained from the records of Registrar and Transfer Company of Jersey City, New Jersey, the stock transfer agent of Drew; and it is further

ORDERED that said Registrar and Transfer Company, transfer agent, permit plaintiff's counsel to inspect and copy all stock transfer records relating to Drew National Corporation for purposes of mailing said notice; and it is further

ORDERED that notice be given at plaintiff's expense to each brokerage firm, determined from the Drew stock transfer records to be a class member, and that the brokerage firm be notified that the court requests that the brokerage firm inform plaintiff by October 1, 1976, of the charge which it will impose if it were to either

(a) forward the Notice to Class Members of Class Action Pendency to the last known address of its records of each beneficial owner of Drew National stock purchased during the class period; or

(b) furnish, in writing, to plaintiff's counsel a list of the names and last known addresses shown on the records of such brokerage firm of each beneficial owner of Drew National stock purchased during the class period; and it is further

ORDERED that, by October 31, 1976, plaintiff shall inform the brokerage firm to either

(a) forward the Notice to Class Members of Class Action Pendency to the last known address on its records of each beneficial owner of Drew National stock purchased during the class period; or

(b) furnish, in writing, to plaintiff's counsel a list of the names and last known addresses shown on the records of such brokerage firm of each beneficial owner of Drew National stock purchased during the class period; and it is further

ORDERED that the foregoing notice be given to all class members as soon as practicable but in no event later than November 30, 1976.

SO ORDERED

/s/ Charles Stewart, Jr
United States District Court Judge

Dated: New York, N.Y.
July 15, 1976

LEGAL NOTICE

IMPORTANT NOTICE TO ALL PERSONS OTHER THAN DEFENDANTS WHO PURCHASED DREW NATIONAL CORPORATION STOCK AT ANY TIME DURING THE PERIOD FROM JANUARY 2, 1971 TO JANUARY 9, 1975 INCLUSIVE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STELLA WEISS, a/k/a STELLA YDOWITZ, Plaintiff, -against- DREW NATIONAL CORPORATION, et al., Defendants.	75 Civ. 4186 (C.E.S.) and three consolidated actions. NOTICE TO CLASS MEMBERS OF PENDENCY OF CLASS ACTION

You are hereby notified that plaintiff heretofore filed a civil action in this Court seeking money damages on behalf of herself and other persons similarly situated, who were purchasers of DREW NATIONAL CORPORATION ("Drew") common stock. This Court has certified a class on whose behalf this litigation may proceed. The class consists of all persons, other than defendants, who purchased Drew common stock at any time during the period from January 2, 1971 to January 9, 1975 inclusive.

This proceeding is a consolidation of four actions pending in this Court. The complaints in these actions charge that the defendants entered into a conspiracy to inflate the market value of Drew stock by misrepresenting Drew's financial condition and future prospects in various documents disseminated to the public, thereby causing the plaintiff class to purchase Drew stock at inflated prices. The complaints allege claims under Section 10(b), 13(a), and 14(a) of the Securities and Exchange Act of 1934 and under common law principles. The defendants include Drew, certain of its present and former directors, as well as its independent auditors prior to 1974.

The defendants have denied these allegations, have denied any wrongdoing and have asserted affirmative defenses.

All pleadings and papers filed in this action are available for inspection at the Office of the Clerk of the United States District Court, Southern District of New York, Foley Square, New York, New York, and may be inspected for a fuller description of claims and defenses.

This Court has ruled that plaintiff's class action claims may be maintained as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, and has ordered that this notice be given to class members with respect to such claims.

The sending of this notice is not to be construed in any way as an expression of any opinion by this Court as to the merits of the action. This notice is merely to advise of the pendency of this action and of certain rights that the addressee of this notice may have with respect to the action.

The purpose of this notice is to ascertain whether you want to be included in the class for whose benefit the class action claims are brought. IF YOU WISH TO BE INCLUDED IN THE CLASS, YOU NEED NOT RESPOND TO THIS NOTICE. All those included in the class will be entitled to share in the benefits of any judgment favorable to the class but will also be bound by any judgment unfavorable to the class. If there is a recovery, this Court will be asked to authorize payments of litigation expenses and reasonable counsel fees to plaintiff's attorneys to be deducted from the amount recovered. In the case of a recovery, you will be required to prove membership in the class and your individual damage. If there is no recovery, i.e., a decision favorable to the defendants, there will be no liability on your part for either fees or expenses. In any case, you will not be required to give up or sell your Drew shares.

IF YOU DESIRE TO BE EXCLUDED FROM THE CLASS, you should fill out the exclusion form below no later than sixty (60) days from the date of this notice, addressed to the Clerk of the United States District Court, Southern District of New York, Post Office Box , Grand Central Post Office, New York, New York 10017. You must also state the name and address of the person so seeking exclusion and the number of Drew shares purchased during the class period. Persons who request exclusion will not be entitled to share in the benefits of a judgment or settlement favorable to the class and will not be bound by any judgment unfavorable to the class.

If you wish to participate in the class action claims and be included in the class described above, you may, if you so desire, enter an appearance through counsel of your own choosing and will then have all the rights and obligations set forth in Rule 23 of the Federal Rules of Civil Procedure. If you so desire to be included in the plaintiff class and do not select your own counsel, the interest of the class will be represented by counsel for the class. The Court has designated the firm of Arthur N. Abbey, One East 44th Street, New York, New York 10017, as lead counsel for the class.

Dated: New York, New York
July , 1976

RAYMOND F. BURGHARDT

Request for Exclusion

Clerk, U.S.D.C., S.D.N.Y.
P.O. Box
Grand Central Station
New York, New York 10017

Re: Stella Weiss
v.
Drew National Corporation, et al.
U.S.D.C., S.D.N.Y. 75 Civ. (C.E.S.)

Dear Sir:

I hereby request to be excluded from the class in the above-captioned consolidated civil action. I understand that by requesting to be excluded, I will not be able to participate in any benefits which the class may derive from this action.

_____
Printed Name

_____
Signature

_____
Address

_____
Date - Price - Number of shares Purchased

_____
Date - Price - Number of shares sold

_____
Number of shares retained

NOTE: Fill, sign, and mail this form only if you wish to be excluded from the class in this action.

Class Plaintiffs' Memorandum in Support
of Proposed Class Action Order
Certifying the Class dated September 17, 1976

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, et al., Defendants.	75-C-684

CLASS PLAINTIFFS' MEMORANDUM IN SUPPORT OF CLASS PLAINTIFFS' PROPOSED ORDER CERTIFYING THE CLASS AND DESIGNATING THE MANNER AND TIME OF NOTICE

Pursuant to the Court's direction, counsel for class plaintiffs and defendants have conferred to see whether differences regarding the proposed order for class

certification and notice of pendency could be resolved. Counsel have now reached agreement on all but two of the issues originally raised by defendants -- whether or not plaintiffs must reimburse nominees for expenses involved in notifying beneficial owners of stock registered in "street name," and whether or not the notice should include a proof of claim. Accompanying this memorandum is a proposed Revised Order which class plaintiffs understand is acceptable to defendants except for provisions which relate to these two outstanding issues.

POINT I

CLASS PLAINTIFFS ARE NOT PROPERLY REQUIRED TO REIMBURSE NOMINEES FOR THE COST OF FORWARDING THE CLASS NOTICE TO BENEFICIAL OWNERS

Both plaintiffs and defendants agree that the notice will be mailed to all registered owners of Franklin New York Corporation securities for the relevant period and that the notice will inform nominees of their duty to transmit the notice to beneficial owners.

However, defendants propose that the order recite that plaintiffs are responsible for all nominees' costs of forwarding the notice to the beneficial owner (see defendants' original counter order, ¶10). As shown below, imposing such

costs on plaintiffs is inconsistent with the Supreme Court's ruling in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) (Eisen IV), that class plaintiffs need only bear the cost of reasonable efforts to provide individual notice, conflicts with other persuasive precedent, and would create an economic burden on class representatives which is inappropriate in light of the public interest in class actions as a key device for protection of investors. Such costs are more appropriately allocated to nominees who benefit by registering stock in street name for their own purposes.

(a) Nature and Scope of the Problem

The issue arises because persons purchasing securities sometimes fail to register such securities in their own names, but leave them in the name of a nominee such as a brokerage firm, trustee, or bank. According to the "SEC Street Name Study, Preliminary Report of December 4, 1975," CCH Fed. Sec. L.Rep. No. 619, Part II, December 11, 1975 ("Street Name Study"), financial intermediaries other than brokers held in nominee name approximately 18%, and brokers held in nominee name approximately 18.6%, of the common and preferred shares of canvessed public corporations. Registering securities in street or nominee name is sufficiently widespread to make the allocation of costs of identifying beneficial owners an issue of significance for securities class actions generally.

As indicated in the affidavit of Melvyn I. Weiss which accompanies this Memorandum ("the Weiss affidavit"), nominees have increasingly sought to burden class representatives with the costs of identifying beneficial owners. Since for any given class, a large number of nominees may be listed as registered owners, the cumulative cost of reviewing their records to see whether beneficial owners do exist and of identifying relevant names and addresses could be an extremely substantial burden for a class representative to shoulder. As shown in the Weiss affidavit, such costs may be incurred by a broker even if few or no relevant beneficial holders are ultimately discovered. Unless controlling precedent requires such a result, the Court should seek to avoid imposing such a burden on class representatives in light of the strong recognition in this and other circuits of the public interest in class actions as a key device for protecting investors. E.g., Green v. Wolf Corp., 406 F. 2d 291, 295, 301 (2d Cir. 1968); cert. denied, 395 U.S. 977 (1969); Esplin v. Hirschi, 402 F. 2d 94, 101 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969); Harris v. Palm Springs Alpine Estates, Inc., 329 F. 2d 909, 913 (9th Cir. 1964).

(b) Nominees Should Not Be Allowed To Impose on The Class Costs Of Identification Which Result From The Nominees' Concealment For Their Own Benefit Of The Names And Addresses of Beneficial Owners

By allowing themselves to be listed as the record owners of securities owned beneficially by customers, nominees create an artificial layer of ownership which obstructs communication with beneficial owners who are members of the class. As indicated in the Weiss affidavit, piercing the artificial layer of street name ownership to reach beneficial owners may be a time-consuming, complicated and expensive operation. Indeed the Street Name Study reveals that the originating motivation for the nominee system was the desire to conceal the existence of a fiduciary relationship with beneficial owners so that fiduciaries would not be required to show authority to effect transactions. See Street Name Study, pp. 2-7. Such Study also recognizes that street and nominee registration of securities has hampered the efforts of issuers and others to communicate with the beneficial owners of securities (page 19), and notes that there have been proposals to end the practice of street or nominee registration so as to make the beneficial owners of securities more easily identifiable and accessible (page 23). Since it is nominees who have created this obstacle to notifying beneficial owners, such nominees should bear the extra costs which their business arrangement with their customers has made necessary.

The above conclusion is reinforced by the fact that the nominees and not the class receive substantial benefits from the practice of registering securities in street name. The use of street name affords brokers an opportunity to engage in a number of profitable business operations. Use of street name permits brokers to minimize their expenses and overhead incident to the transfer and registration of securities:

> "Registration of certificates in nominee and street name facilitates the completion of securities transactions by institutions and brokers. It eliminates the need for numerous routine transfers by enabling brokers to deliver securities without the necessity of first transferring record ownership. Under industry practice, a buying broker will accept delivery from a selling broker of securities registered in street name (though not necessarily in the selling broker's street name), and a buying broker in turn may deliver such securities to another broker, in each case without the need to transfer record ownership prior to delivery." Street Name Study, p. 15.

The use of street name permits brokers to engage in profitable sales of their customers' securities purchased on margin and held by the brokers as collateral for the margin loan:

> "A stockbroker who purchases stock for a customer dealing on margin has the implied right, in the absence of an agreement to the contrary, to sell the stock, provided he retains in his possession and control the equivalent in kind and amount which

> will be available to the customer in the event the customer desires to close the account and take away the securities to which he may be entitled. This right is implemented by placing the purchased stock in street name so that it can be effectively transferred by the broker". 6 N.Y. Jur. Brokers, §65 (1959) (emphasis added)

Placing securities in street name also facilitates short sale transactions in which a broker borrows and sells street name securities, remitting the proceeds to the lending broker as collateral for the loan, which lending broker earns valuable interest income on the collateral or makes other use of such funds until the shares are returned. See Cohen and Zinbarg, Investment Analysis and Portfolio Management (Richard D. Irwin, Inc. 1967), p. 67. Further benefits flow from the broker's crediting of dividends on customers' stock to the customer's free credit balance, since the broker can within certain limits use that balance to extend credit to other customers.

Since it is thus nominees who benefit from the practice of registering securities in street name, a practice which, as above noted, makes exceedingly complex and expensive efforts to communicate with beneficial owners, it is entirely proper that the nominees bear the extra expenses which must be incurred to forward notices to class members whose stock was in street name.

(c) Nominees have a Fiduciary Obligation to Transmit Notices to Beneficial Owners Of Stock in Nominee Name

Registration of stock in street or nominee name reflects the nominee's agreement with the beneficial owners that the nominees will serve as the agents of such beneficial owners for the purpose of receiving important notices relating to the securities involved. Thus, the Uniform Commercial Code permits notice to the registered owner of a security without more to constitute notice to the beneficial owner thereof. The Code, in force throughout the United States with the exception of Louisiana, permits an issuer or indenture trustee to "treat the registered owner as the person exclusively entitled to vote, to receive notifications and otherwise to exercise all the rights and powers of an owner." U.C.C. 8-207(1) (emphasis added). That the law recognizes that record owners may be entrusted with protecting beneficial owners is reflected in the fact that substantial questions have been litigated concerning the standing of a beneficial but not registered owner to bring a derivative suit in light of a California statute restricting the right to bring derivative actions to registered owners.*

The fiduciary duty of broker-dealers to carry out undertakings to their customers with the utmost good faith, loyalty and care is widely recognized. E.g., Barnett v. United States, 319 F. 2d 340, 344-45 (8th Cir. 1963); Opper v. Hancock Securities Corp., 250 F. Supp. 668, 673-75 (S.D.N.Y. 1966), aff'd., 367 F. 2d 157 (2nd Cir. 1966); Selcow v. Floersheimer, 20 A.D. 2d 889, 248 N.Y.S. 2d 934

* See Drachman v. Harvey, 453 F. 2d 722, 726 (2nd Cir. 1971).

(1st Dept. 1964). Such a responsibility reflects the general duty of an agent to his principal

> "...to fully, fairly, and honestly disclose all material facts which come to his knowledge or attention, and which relate to the subject of the agency. McCormack v. Security Mutual Life Insurance Co., 220 N.Y. 447, 458, 116 N.E. 74; Casco National Bank of Portland v. Clark, 139 N.Y. 307, 313, 34 N.E. 908, 36 Am.St.Rep. 705; Henry v. Allen, 151 N.Y. 1, 9, 45 N.E. 355, 36 L.R.A. 658." Hurley v. John Hancock Mut. Life Ins. Co., 247 App. Div. 547, , 288 N.Y. Supp. 199, 203 (4th Dept. 1936).

Thus, defendants are requesting this Court to order the class to pay nominees for doing what the nominees are already obligated to do without compensation from plaintiffs -- i.e., advising their customers of a matter which significantly affects their interests and which falls directly within the scope of the agency which nominees have undertaken.*

* Even if certain class members are no longer customers of the nominees involved, the nominee's duty to transmit the notice to such former customers continues. By placing securities in nominee name, nominees encourage their customers to believe that the nominees would transmit to them important notices from the company involved. Since nominees and customers both understood that nominees might on occasion have to serve as intermediaries with respect to such information even after customers ceased to have accounts with them, nominees have encouraged former customers to continue to place their trust in petitioners to carefully forward such information. Such foreseeable reliance by former customers on the care and good faith of nominees creates a continuing fiduciary responsibility to former customers to inform them of class notices. It may also be considered at minimum an implied part of nominees' contracts with their customers that they will continue to forward critical communications and material received as a result of their relationship with the customers after the customer transfers its account.

(d) Persuasive Precedent Supports Rejection of Defendants' Position

In Eisen IV, supra, the Supreme Court held that in class actions brought under Rule 23(b)(3) the class representative need only bear initially the cost of providing "individual notice...to all class members who can be identified with reasonable effort." 417 U.S. at 177 (footnote omitted) (emphasis added). Consequently, individual notice was only required in Eisen IV for slightly over one-third of the class in that action. See 417 U.S. at 167-68.

In light of the considerations set forth above under subsections (a) through (c) above, the "reasonable effort" standard enunciated in Eisen IV should be deemed satisfied when the party charged with the obligation of giving notice to the class mails individual notice to the registered owners and offers extra copies of the class notice to all brokers or other nominees appearing on the list of record owners for forwarding by such brokers directly to their customers. Such procedure is consistent with that contemplated in the orders for certification and notice proposed by defendants as well as plaintiff herein. Several post Eisen IV decisions have reflected the frequent utilization of this procedure for the notification of beneficial owners of street name securities, and have held that it satisfies not only Rule 23 and the "reasonable effort"

standard of Eisen IV, but also the underlying due process standard of the Fifth Amendment. E.g., In Re National Student Marketing Litigation v. The Barnes Plaintiffs, 530 F. 2d 1012, 1015 (D.C. Cir. 1976); In Re Four Seasons Securities Laws Litigation, 63 F.R.D. 422, 430 (W.D. Okla. 1974), aff'd, 525 F. 2d 500 (10th Cir. 1975). As indicated in such rulings, nothing in Eisen IV states that, in addition to identifying and notifying all registered holders, a class representative must in the process of effecting reasonable notice shoulder the burden of conducting additional discovery to determine the names and addresses of class members who at their broker's or other nominee's suggestion have chosen not to list securities in their own names. See also, U.C.C. §8-207(1).

The opinion of the Court in Blank v. Talley Industries, Inc., 54 F.R.D. 627 (S.D.N.Y. 1972) is directly in point and rejects defendants' position with respect to allocation of costs. In Talley, then District Judge Gurfein denied the request of Merrill, Lynch, Pierce, Fenner & Smith, for reimbursement of expenses to be incurred in complying with a subpoena duces tecum in a class action requesting the names and addresses of certain stockholders of General Time Corporation as shown on Merrill, Lynch's records. The Court stated:

> "In view of the number of brokerage firms involved in the plaintiffs' court-ordered quest for class members' identities, it would be unfair to compel the plaintiffs to cover the costs of the firms' production of information, which costs when cumulated would indeed be burdensome. No other broker has requested reimbursement. In this class action I do not feel compelled in my discretion to require plaintiffs to pay the expenses of Merrill Lynch. These expenses are in the nature of overhead expenses necessary for responding to legitimate court orders involving the customers of stockbrokers. Cf. Control Data Corp. v. International Business Machines Corp., 68 Civ. 312 (D. Minn. 1971) (pre-trial order no. 9, paragraph 5). Merrill Lynch should provide the required information on or before April 26, 1972." Id. at 627.

The ruling in Talley thus recognizes that brokerage firms properly absorb such expenses because they benefit from the system of operation which gives them control of such information. Moreover, the Court expressly stated its concern over the prospective cumulative financial impact of the requested ruling on the class representative. While under Eisen IV a class representative must pay the costs of reasonable notice even if they are burdensome, defendants agree that reasonable notice herein consists of mailing the notice to registered holders with an instruction to nominees to notify beneficial holders. In consequence, considerations of the relative financial impact on the class representatives and on the individual nominees for activities over and above

such reasonable notice is appropriate and fully consistent with Eisen IV*.

In In Re Penn Central Securities Litigation, MDL #56 (E.D. Pa., June 21, 1976) Chief Judge Lord denied the requests of various brokerage firms to be reimbursed for their expenses incurred in forwarding copies of a class notice to their customers. The Court recognized the inequity of requiring the entire class, which includes those who chose not to purchase in street name, to bear extra costs made necessary because of an agreement between some class members and their brokers to utilize street name registration:

> "Nothing the brokers have pointed to in their brief convinces us that the class fund should bear the costs of forwarding the documents involved. Neither trade custom nor the inapposite holding of the Supreme Court in Eisen IV, supra at 179 overcomes the very obvious and common sense logic that if the brokers are to be reimbursed, it should come -- if at all [38] -- from the individual beneficial owners involved --not the entire class. There is simply no reason to require the entire class to pay

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* The relative financial abilities of plaintiff and Merrill Lynch to absorb the expense involved was undoubtedly an element in the court's decision in Talley. It has been held that the relative financial resources of the party seeking information through the use of legal process and the non-party from whom information is sought is a key factor in determining which side should bear the expenses incurred in compiling the requested information. See United States v. Int'l Business Machines Corp., 62 F.R.D. 507, 510 (S.D.N.Y. 1974); 5A Moore, Federal Practice ¶45.05[2], page 45-50, 51, note 45 (2 ed. 1975).

for the choice of a few to have their stock held in street name." (emphasis added)*

A copy of the relevant portion of Chief Judge Lord's decision is annexed hereto as Attachment A.

Defendants may rely for their argument on Sanders v. Levy, Docket Nos. 75-7608, 75-7610, 75-7611, (2nd Cir. June 30, 1976) (summary of opinion reported in CCH Fed. Sec.L.Rep. ¶95,647 (June 30, 1976). In Sanders, a divided panel of the Second Circuit required a class representative to reimburse Oppenheimer Fund, Inc. for its expenses incurred in compiling, from its computer tapes, a list of owners of Oppenheimer Fund securities as maintained by the Fund's transfer agent. Sanders is inapplicable herein because it does not consider or deal with the issue of who should bear the burden of extra costs arising from registration of securities in street name or discuss the question whether, as held in cases such as In Re Four Seasons Securities Laws Litigation, supra, and National Student Marketing Litigation, supra, class representatives fulfill their responsibilities under Eisen IV through a suitable notice to all record owners.

* The Court's footnote 38 reads as follows:

> "We are not faced with, and do not decide, the obligation of the beneficial owner vis a vis the brokerage houses which held the stock in street name."

Thus, Sanders requires only that the costs of culling the identities of registered owners from the defendant's transfer records be borne by the class representative. Moreover, the reasoning of the Sanders opinion supports rejection of defendants' position in that Sanders stressed that

> "We may not assume that non-class member shareholders would approve of the Fund underwriting these expenses for the benefit of other shareholders." Slip Opinion, p.4583, fn. 3.

Similarly, the Court herein should not impose upon class members who did not purchase their securities in street name extra costs incurred solely because other class members and their brokers chose to obscure such class members' identities as beneficial owners.*

Plaintiffs submit that in light of the above considerations, including the beneficial owners' designation of nominees as their agents for receipt of notices,

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* A recent Southern District opinion concluded that under Sanders the class representative and not the broker should pay the costs of identifying beneficial owners. Weiss v. Drew National Corp., 75 Civ. 3816 (S.D.N.Y. July 19, 1976), Opinion, p.2. However, the Court in Drew National failed to recognize or consider that Sanders had not focussed on the distinction between notice to registered owners and supplementary work necessary to communicate with beneficial owners. Consequently, plaintiff submits that Drew National was wrongly decided and should not be followed herein. Plaintiffs are informed that a motion for reconsideration of the decision in Drew National is currently pending. Plaintiffs also note that the issue of responsibility for costs to nominees of notifying beneficial owners is currently being considered by Judge Weinstein in response to a motion made by a group of nominees in Jahre v. Rait, et al., (E.D.N.Y.)(74-C-805) (76-C-1305).

defendants' agreement that mailing the notice to registered holders with suitable instructions to nominees is sufficient notice under Eisen IV, the benefits flowing to nominees from use of the street name practice, and the substantial burden the costs of identifying beneficial owners would constitute for a class representative, defendants' argument that such costs should be allocated to class plaintiffs should be rejected.

POINT II

DEFENDANTS' PROPOSED PROOF OF CLAIM WOULD SERVE LITTLE PURPOSE, WILL CREATE CONFUSION, AND IS INAPPROPRIATE AT THE PRESENT STAGE OF THE LITIGATION

Defendants propose that the Notice of Pendency include a proof of claim which, when completed by a class member, would state the dates, amounts and prices at which the class member purchased and sold Franklin New York Corporation securities. Defendants explain that such a proof of claim is proposed because of defendants' belief that

> "it will better promote the efficient conduct of the litigation to have information as to the size of the class and the amounts of respective class members' claimed damages (particularly after taking into account those purchasers who also sold during the class period) before the court early in the progress of the litigation." Affidavit of Barbara A. Lee sworn to September 2, 1976 (the "Lee affidavit"), pages 4 - 5.

However, defendants state that the proof of claim "does not contemplate denial of recovery to class members who fail to file proof of claim prior to a judgment on the merits . . ." (Lee affidavit, page 5), and the proposed proof of claim expressly states that "Completing and returning this form is voluntary" and that failure to return the form "will not preclude you from a recovery in the event plaintiff is successful in these actions."

Since the proof of claim advertises on its face that failure to return the proof of claim will have absolutely no impact on a class member's right to an eventual recovery, it is entirely possible that many class members will not bother to complete and return the proof of claim at this time. As a result, neither the parties to this action nor the Court will have any basis for evaluating the size of the class and "the amounts of respective class members' claimed damages" after reviewing those proofs of claim which are in fact returned. Indeed, the voluntary nature of the proof of claim wholly undermines the basic purpose defendants attribute to it.

Moreover, the proof of claim form would almost certainly be a source of confusion to class members. The very use of the title "Proof of Claim" may suggest that class members will be adversely affected if they fail to

return the form notwithstanding the disclaimer on the form. Based on past experience in class actions, mailing the proof of claim is almost certain to give rise to numerous telephone calls from class members seeking information and clarification concerning the form. Dealing with such questions at this stage of the litigation will unnecessarily distract plaintiffs from pressing on with the merits of the lawsuit. Finally, a second and binding proof of claim will of course be required after a settlement or a judgment of liability. The existence of a prior proof of claim can only produce further confusion on the part of class members.

The Manual for Complex Litigation advises against the proof of claim procedure proposed by defendants:

> "It appears that a proof of claim to be submitted after a judgment establishing liability is most often the surest way of utilizing the procedure so that it does not confuse or prejudce absent class members or require proof which cannot be obtained at the outset of a case. 'More often ...the courts await the adjudication of the liability issue before adopting procedures to notify class members to come forward and assert their claims.' Miller, 'Problems in Administering Judicial Relief in Class Actions', 54 F.R.D. 501, 505 (1972). See also Zients v. LaMorte, [Federal Securities Law Reporter, 1971 - 1972 Decisions, Transfer Binder, ¶93,445], 459 F.2d 628 (C.A.2 1972); Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y.1970)." Manual for Complex Litigation, §1.45, page 21 (1973).

Many courts and commentators have recognized that a special advantage of the class action procedure is that it enables courts and the parties to postpone consideration of details concerning individual class members until common questions concerning defendants' liability have been determined. See, e.g., Green v. Wolf, 406 F.2d 291, 301 (2nd Cir. 1968), cert. denied, 395 U.S. 977 (1969); State of Illinois v. Harpers & Row Publishers, Inc., 301 F.Supp. 484, 490-91 (N.S.Ill. 1969).

While certain courts have allowed proofs of claim to be included in notices of pendency (see e.g., Korn v. Franchard Corp., 50 F.R.D. 57, 59-60 (S.D.N.Y. 1960)), as shown above, the practice is not preferred. Indeed, the utility of the proof of claim device in Korn v. Franchard Corp., supra, was highly questionable since a subsequent decertification of the class based in part on inadequacies in filings of an optional proof of claim was reversed by the Second Circuit in an opinion which stressed that little weight was to be accorded responses to the opportunity to file such a proof of claim. Korn v. Franchard Corp., 456 F.2d 1206, 1209-12 and fn.12, page 1211 (2nd Cir. 1972).

Judge Frankel has observed that a number of decisions upon which defendants may be relying reflect the mistaken assumption that pre-trial discovery from class

members is a prerequisite to obtaining a judgment which would affect the class as a whole.* Hon. Marvin E. Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 47 (1967). Judge Frankel further stated that:

> "...if the plaintiff class prevails on the common questions, it will then--but only then--become necessary to try to settle or otherwise dispose of individual questions like reliance, damages, or the like. If the common questions have been aptly defined, there should be no need at an earlier stage to have all the individual class members before the court for discovery or any other purpose." (43 F.R.D. at 47) (emphasis added).

Consequently, plaintiffs submit that the proposed proof of claim should be rejected as an inappropriate diversion from common questions concerning defendants' liability, which diversion is not well calculated to provide the information sought by defendants.

CONCLUSION

For the reasons presented above, class plaintiffs

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* As examples of such decisions, Judge Frankel cited School Dist. of Philadelphia v. Harper & Row Publishers, Inc., 267 F.Supp. 1001, 1005 (E.D. Pa. 1967); Hirschi v. B. & E. Securities, Inc., 41 F.R.D. 64, 67 (D. Utah 1966); Harris v. Jones, 41 F.R.D. 70, 75 n.10 (D.Utah 1966).

request that the Court grant class plaintiffs' motion for an order certifying the class and designating the manner and time of notice in the form set forth in class plaintiffs' revised proposed order which accompanies this memorandum.

Dated: New York, New York
September 17, 1976

Respectfully submitted,
MILBERG & WEISS

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OF COUNSEL:

MELVYN I. WEISS
JEROME M. CONGRESS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: : M.D.L. DOCKET NO. 56
:
PENN CENTRAL SECURITIES :
LITIGATION :

O P I N I O N

JOSEPH S. LORD, III, CH. J. JUNE 21, 1976

The bankruptcy of the Penn Central Transportation Company has provided no dearth of business for the courts. As a result, the financial morass into which the various Penn Central companies fell has kept occupied a significant number of lawyers. Those lawyers who have prosecuted the Penn Central Securities Litigation to settlement have now petitioned for the award of counsel fees.

I. Background

Fortunately it is unnecessary for the purposes of this opinion to discuss in any detail the history of this case, most of which may be gleaned from a number of previously published opinions.[1] However, even for the limited purpose of awarding counsel fees it will be necessary to relate briefly some aspects of this litigation.

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1. 395 F.Supp. 192 (E.D.Pa. 1975); 62 F.R.D. 181 (E.D.Pa. 1974); 367 F.Supp. 1158 (E.D.Pa. 1973); 349 F.Supp. 1029 (Jud. Pan. Mult. Lit. 1972); 347 F.Supp. 1324 (E.D.Pa. 1972); 347 F.Supp. 1327 (E.D.Pa. 1972), modified on rehearing, 357 F.Supp. 869 (E.D.Pa. 1973), aff'd, 494 F.2d 528 (3d Cir. 1974); 338

While the Trustees' evidence on the question of allocation left something to be desired, we find that 30% of the costs as detailed in their motion can properly be allocated to plaintiffs in this case.[36] We will award the Trustees a total of $52,859.22 from the settlement fund for expenses incurred in the maintenance of their depository.

Finally we come to the request of a number of brokerage hourses[37] for reimbursement of their costs in forwarding the class action notices to the beneficial owners of the stock involved. This is stock which the brokerage houses held in "street name."

Nothing the brokers have pointed to in their brief convinces us that the class fund should bear the costs of forwarding the documents involved. Neither trade custom nor the inapposite holding of the Supreme Court in Eisen IV, supra at 179 overcomes the very obvious and common sense logic that

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36. In addition to plaintiffs, defendants and a number of governmental agencies made use of the document depository. Any costs incurred as a result of governmental use of the depository is a matter between the Trustees and the agencies involved. That the Trustees might be unable to collect from the agencies involved does not mean that plaintiffs should shoulder the burden. Further, we reject the Trustees' argument that the plaintiffs should pay for defendants' use of the depository. The Trustees' claim that this was implicitly understood as part of the settlement agreement borders on the frivolous.

37. Including Shearson Hayden Stone, Inc., Bache & Co., Inc., Drexel Burnham & Co. Inc., Loeb, Rhoades & Co., Paine Webber Jackson & Curtis Inc., and Wheat, First Securities, Inc.

if the brokers are to be reimbursed, it should come--if at all[38] --from the individual beneficial owners involved--not the entire class. There is simply no reason to require the entire class to pay for the choice of a few to have their stock held in street name.

V. Individual Petitioners

David Berger, P.A.

Mr. Berger and his firm took a leading role in prosecuting this litigation. They were responsible for conducting a great deal of the discovery taken on behalf of the Holding Company stockholder class. In conducting strategy, discovery, pretrial, negotiation and settlement sessions, petitioner consistently played a major role and acted in a leadership capacity. There is no doubt that petitioner deserves the majority of the fees awarded from the Holding Company stockholder fund.

The petition, which has broken down the hours worked by category, reveals that a total of 292.5 hours were spent drafting the complaint and investigating the facts and law before the appointment of liaison counsel. As stated previously, we will compensate this time at the straight hourly rate of $20.

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38. We are not faced with, and do not decide, the obligation of the beneficial owner vis a vis the brokerage houses which held the stock in street name.

Affidavit of Melvyn I, Weiss dated
September 17, 1976

9/17/70

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff,	75-C-684
- and - LOUIS PERGAMENT, Intervenor-Plaintiff,	AFFIDAVIT
- against - ERNST & ERNST, et al., Defendants.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MELVYN I. WEISS, being duly sworn, deposes and says:

1. I am a member of the firm of Milberg & Weiss, liaison counsel for class plaintiffs in this consolidated multi-district litigation. I submit this affidavit in opposition to defendants' request that the order certifying the class herein require the class representative to reimburse registered owners of Franklin New York Corporation securities who are nominees for the nominees' costs incurred in identifying beneficial owners and retransmitting the notice to beneficial owners.

2. My firm is actively engaged in class litigation throughout the United States and has been appointed lead counsel, liaison counsel or a member of the plaintiffs' steering or executive committee in numerous major class actions, some of which are U.S. Financial Securities Litigation, MDL #161; CNA Securities Litigation (N.D.Ill.) (74-C-3117); and In Re Stirling Homex Securities Litigation (MDL-126).

3. During the course of prosecuting those actions, class action notices have been sent, sometimes during the prosecution of the action and prior to settlement, and on other occasions together with a settlement notice.

4. For many years, no question was raised by nominees concerning their obligation to forward these notices to the class members without reimbursement from class representatives for the cost of identifying names and addresses of beneficial owners or mailing the notices to those owners. However, within the past year, the brokerage community has commenced a practice of sending bills to the class representative for reimbursement of those costs.

5. In the recent Ampex settlement, now pending in the Northern District of California, several invoices have been received from brokers requesting reimbursement of these expenses. A typical example is the letter attached hereto as Exhibit A from E.F. Hutton dated June 24, 1976, addressed to David Berger of Philadelphia with a copy to me. This letter evidences that E.F. Hutton wants to be reimbursed for searching its computer for the names of beneficial owners during the class period as well as for mailing these notices to beneficial owners. It is quite possible that once having performed the search, E.F. Hutton will come up with but a few names of beneficial owners during that

period. Prior to conducting the search, there is no way of determining how many members of the class are involved.

6. It is not difficult to conclude that an order directing reimbursement for the costs of computer searchs and mailings to beneficial owners of all nominees listed in transfer records may well amount to an enormous sum of money even in a case where a relatively small number of class members exist. Regardless of whether a broker will ultimately identify two such customers or 500 such customers during a relevant period, the cost to make the computer search will be the same.

7. Our experience indicates that the typical stockholders list will include anywhere from 50 to 200 names of nominees. An average cost of $200 per nominee will run anywhere from $10,000 to $40,000. I have even received bills from some brokers at the rate of $300 per year of search in situations where the class period ran close to three years, thereby creating a possible burden in excess of $200,000 for such searches.

8. In view of the fact that the registration of securities in street name is principally for the economic benefit of the customer and its broker, it is hardly reasonable to impose the cost of piercing that additional layer of ownership on a class representative seeking to protect those class members. Indeed, the imposition of such a cost in class action litigations would have a serious impact upon the entire class action procedure.

9. As noted in the accompanying memorandum, an example of the recognition under the law of the significance of record ownership is reflected in the fact that substantial questions have been litigated concerning the standing of a beneficial but not registered owner to bring a derivative suit in light of a California statute restricting the right to bring derivative actions to registered owners. See Drachman v. Harvey, CCH Fed.Sec.L.Rep. [1970-71 Tr. Binder] ¶93,129 (2d Cir. 1971). Furthermore, the Uniform Commercial Code entitles issuers and trustees to send all notices to registered holders. See U.C.C. 8-207(1). Thus, the law has recognized that record owners may be entrusted with notices affecting beneficial owners and in many instances must bear the responsibility of protecting beneficial owners.

10. As shown in the accompanying memorandum, applicable precedent supports denial of defendants' request, and such denial is particularly appropriate in light of the unreasonable burden such costs would impose on the bringing of class actions for the protection of investors.

MELVYN I. WEISS

Sworn to before me this
17th day of September, 1976.

Notary Public

MAE EISENBERG
Notary Public, State of New York
No. 30-4900174 Qual. in Nassau Co.
Cert. Filed in New York County
Commission Expires March 30, 1977

6-24-76

E F Hutton & Company Inc
Member New York Stock Exchange

A 207

EF Hutton

One Battery Park Plaza
New York, N.Y. 10004
Telephone (212) 742-5000

June 24, 1976

David Berger, Esq.
1622 Locust Street
Philadelphia, Pa. 19103

RE: BENEFICIAL OWNERS OF AMPEX CORPORATION
COMMON STOCK AND 5½% CONVERTIBLE
SUBORDINATED DEBENTURES

Dear Mr. Berger:

On June 21, 1976, E. F. Hutton & Company Inc. received the "Notice Of Settlement Hearing On Partial Settlement And Pendency Of Class Action"... in connection with the above referenced matter.

With respect to your requirement that we forward the subject Notice and Proof of Claim Form to certain beneficial owners, please be advised as follows: As of June 21, 1976, E. F. Hutton & Company Inc. was record owner on behalf of 863 clients, both debenture holders and stockholders. With regard to these current beneficial owners, we will be pleased to mail the Notice and Proof of Claim if you will provide our Proxy department with sufficient copies of the Notice and Proof of Claim and, agree to pay actual mailing expenses.

With respect to your request to forward the Notice and Proof of Claim to "all persons who purchased common stock or 5½% convertible subordinated debentures of Ampex Corporation during the period May 2, 1970 through and including August 3, 1972, please be advised that such a list is not maintained by E. F. Hutton & Company Inc. in the ordinary course of business. As I have previously advised, such an actual business record is maintained with respect to those customers for whom we currently hold as record owner.

In order to assist you in meeting your fiduciary obligations in contacting all members or potential members of the class, we would be pleased to make our facilities available to you as follows.

Through the use of our computer research facilities, the information you have requested can be extracted from our overall trading records. Our computer costs are calculated as follows. Computer time costs approximately $250.00 per hour. It is necessary to run through an entire year's trading in order to extract information for part of the year. Each such yearly run takes

(CONTINUED)

EXHIBIT A

approximately 20 to 25 minutes. Therefore, in the case of your request concerning beneficial owners of both Ampex common stock and subordinated debentures, it would be necessary to run three year's trading for each of the two securities through the computer; which will aggegate approximately two (2) hours. Accordingly, we request that you forward to us a check in the amount of $500.00. Upon receipt of the same, we will expeditiously reply with your request, with the understanding that you also agree to reimburse us for our actual mailing expenses as provided in New York Stock Exchange Rule 465 as well as providing us with actual copies of the Notice and Proof of Claim sufficient to make such a mailing. In the event that you desire to make this mailing at your own cost and expense, we will be pleased to supply a list of names and addresses to you so that you may make all such mailings without compensating E. F. Hutton for the actual mailing expenses. If you desire to make such an election, please advise us that you will use any such list solely for purposes of notification of class and potential class members, and not for any commercial purpose. Similarly, if you do not wish to provide us with sufficient copies of the Notice and Proof of Claim to make a mailing, we will be pleased to arrange to have sufficient copies reproduced, provided that you agree, in advance, to reimburse us for any expenses incurred in reproducing these documents.

Finally, in the event that you do not wish to avail yourself of our computer research facilities, and do not believe that a mailing to current shareholders whose shares are subject to the record ownership of E. F. Hutton is sufficient, we will be pleased to make our facilities available to you so that you may extract the names and addresses of these beneficial owners without compensation to E. F. Hutton & Company Inc. In that regard, any certified public accounting firm of your choice which agrees to keep any list of E. F. Hutton & Company Inc. clients confidential, may inspect our stock record books for the period in question. Once such an accounting firm has isolated the account numbers in question, we will be pleased to translate those account numbers into the actual names and addresses of the clients in question without fee.

Please advise us how you wish to proceed. Because of the number of years which have passed between the subject dates and the present date, many of these records may only be maintained in our warehouse where retrieval is a time consuming process.

Very truly yours,

Robert P. Bramnik
Assistant General Counsel

RPB:hs
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(CONTINUED)

Plaintiffs' Reply Memorandum in Support of Proposed Class Action Order dated September 21, 1976

A 209

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, -and- LOUIS PERGAMENT, Intervenor-Plaintiff, -against- ERNST & ERNST, et al., Defendants.	75-C-684

REPLY MEMORANDUM OF CLASS PLAINTIFFS IN SUPPORT OF CLASS PLAINTIFFS' PROPOSED CLASS ACTION ORDER

Class plaintiffs respectfully submit this reply memorandum in response to certain new arguments raised by defendants in their memorandum in support of their proposed class action order.

Eisen IV does not Require Plaintiffs to Pay for Examination of Brokerage Firm Records

On pages 21-22 of their memorandum, defendants argue that Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) implies

that identification of class members requires review of brokerage firm records prior to mailing the class notice, citing the statement by the District Court in Eisen that notice to banks and brokers "by itself...would be far from satisfactory." 52 F.R.D. at 267. Defendants ignore the fact that Eisen was an antitrust action in which no identification of any class member (whether or not a registered owner) was possible without examination of brokerage firm records because the proposed class did not consist of owners of the securities of any particular corporation, but rather of all persons who traded in odd lots of securities during a specified period on the New York Stock Exchange without regard to the companies which had issued the securities. Since the option in Eisen was either to examine brokerage records or to totally dispense with individual notice to any class member, review of brokerage records in Eisen should not be held to compel such review at the expense of plaintiffs in securities cases where class members or their nominees are readily identifiable through transfer records.

Decisions in securities actions subsequent to Eisen IV support plaintiffs' position. E.g., In Re National Student Marketing Litigation v. The Barnes Plaintiffs, 530 F.2d 1012 (D.C. Cir.1976); In Re Four Seasons Securities Laws Litigation, 63 F.R.D. 422 (W.D. Okla. 1974), aff'd,

525 F.2d 500 (10th Cir. 1975). In In ReNational Student Marketing Litigation, individual notice was mailed to all shareholders of record during the class period, and 3,777 additional notices were requested by brokerage firms and other institutions listed as shareholders of record for forwarding to beneficial owners. The Barnes plaintiffs, including thirty-one street name purchasers, sought relief from court-approved settlements, arguing that notice was defective since plaintiffs had not mailed copies of the class notice to them. The District Court rejected this contention, finding that "reasonable and diligent efforts were pursued to extend the class notice to brokerage firms where shares of stock were held in street name." 530 F.2d at 1015 (footnote omitted). The Tenth Circuit expressly affirmed this finding (Ibid)and stated that "reasonable and orderly procedures were employed to identify and notify those NSMC stockholders composing the Garber and Natale classes." 530 F.2d at 1014.

In In Re Four Seasons Securities Laws Litigation, supra, a street name purchaser moved for relief from a court-approved settlement on the ground that he had not received adequate notice to allow him to "opt-out" of the action or object to the proposed settlement. The motion for relief from judgment was denied by the District Court and affirmed on appeal.

Under the procedure for the notification of street name purchasers adopted by the District Court in Four Seasons, the brokerage firms listed as record owners of the securities of the Four Seasons companies were given the option of either (a) revealing to the Trustee in Bankruptcy of the Four Seasons companies the identities of their street name customers for notification directly by the Trustee, or (b) forwarding copies of the notice provided by plaintiffs directly to their customers. The District Court concluded that this procedure constituted

> "the best notice practicable under the circumstances, that adequate provision had been made for individual notice to all members of the classes who could be identified through reasonable effort, and that such notice met all the requirements of Rule 23. The court adheres to that finding and conclusion." 63 F.R.D. at 427 (emphasis added)

The District Court expressly held that the notice procedure employed was consistent with the requirements of Eisen IV. 63 F.R.D. at 430. The Tenth Circuit affirmed, holding that the notice afforded the street name purchaser was "far more than adequate" and "well within bounds as a discretionary matter for the trial court." 525 F. 2d at 503.

Plaintiffs' Proposed Order Is In Full Compliance with Due Process Requirements and Provides Adequate Protection Against Collateral Attack

Defendants argue that the order providing for notice must recite that plaintiffs will pay nominees costs of notifying beneficial owners or the Court's order would be ineffective as to nominees who are not parties to this action. See defendants' Memorandum, pages 13-20. However, defendants acknowledge that the notice procedure authorized by Rule 23 fulfills due process requirements. See defendants' Memorandum, p. 20, citing the Advisory Committee's Note to Rule 23, 39 F.R.D. 69, 107 (1966). Clearly the Court is authorized to issue an ex parte order which is binding on class members who are not technical parties to this action, in that, for example, class members who do not opt out are bound by orders of the Court. F.R.Civ.P. Rule 23(c)(3) and Rule 23(d). As an integral part of fulfilling its responsibilities to see that class members receive notification the Court may properly issue an order which in effect requires nominees to appear and object or be bound in their capacities as class members or as representatives of class members. Such an order is consistent with the Court's authority under Rule 23 and under constitutional due process requirements, as reflected in the widespread utilization of such orders in

class actions. See, e.g., In Re Four Seasons Securities Laws Litigation, supra; Lamb v. United Security Life Co., 59 F.R.D. 25, 43 (S.D. Iowa 1972).

In Greenfield v. Villager Industries, Inc., 483 F.2d 824 (3rd Cir. 1973), cited by defendants at pages 25-26 of their Memorandum, the Third Circuit held that a brokerage firm which was a nominee had standing to challenge improper notice to class members. The Court emphasized that nominees are themselves proper objects of a class notice; accordingly, the terms and conditions of a class notice are binding upon a nominee unless the nominee actively challenges such terms and conditions:

> "We swiftly dispose of appellees' contention that appellants lack standing. Appellants are record holders of the stock. They are at least nominally the legal, if not the equitable, owners of the shares. They were properly the objects of the public notice because they are 'persons who purchased shares of Villager during the period January 1, 1968, to December 1, 1969.' They appeared at the hearing and presented motions which were denied. They are complaining about exclusion from a class because of improper notice. They are not attempting on this appeal to object to the settlement. As record or legal shareholders they have standing on behalf of the equitable owners of the shares, asserting a wrongful denial of the opportunity to participate in the class action. See Zients v. LaMorte, 459 F.2d 628 (2d Cir. 1972); Sertic v. Carpenters District Council of the United Brotherhood of Carpenters and Joiners of America, 459 F.2d 579 (6th Cir. 1972); Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3rd Cir. 1971); Cohen v. Young, 127 F.2d 721 (6th Cir. 1942)." 483 F.2d at 829 (emphasis added).

Contrary to the argument on pages 13-15 of defendants' memorandum, the decision in Sanders v. Levy, 75-7608 (2nd Cir. June 30, 1976),* allocating to plaintiffs the cost of identifying class members as shown on defendant's transfer records was not predicated on the Court's view that the defendant was not a party to the action, but rather on the view that the costs involved were costs of sending notice to the class and that, while the relationship between plaintiffs and defendant was not a truly adversary relationship, it was "not non-adversarial in a manner which requires an exception to the Eisen IV rule on notification costs...." Slip Opinion, p.4583.

Defendants argue on page 10 of their Memorandum that the fact that a group of brokers have challenged an ex parte order issued by Judge Weinstein in Jahre v. Reit, 74 Civ. 805 (E.D.N.Y.) indicates that nominees will not comply with the notice as proposed by plaintiff. To the contrary, the action of the brokers in Jahre v. Reit shows if anything that nominees take such a notice from the court seriously and that they will either routinely comply with such a notice or will go to court to challenge it. As stated in the affidavit of Melvyn I. Weiss which accompanies plaintiffs' main

*Plaintiffs are informed that a petition for rehearing en banc on the allocation of cost issue has recently been granted in Sanders v. Levy and that briefs will be submitted in that connection on October 22, 1976.

memorandum, the prior experience of plaintiffs' counsel is that nominees do comply with such orders or put class representatives on notice that further proceedings are necessary. For other cases indicating that brokers will respo properly to such a notice, see, e.g., In Re National Student Marketing Litigation v. The Barnes Plaintiffs, supra, 530 F.2d at 1015 (brokerage houses requested 3,777 additional notices for mailing to beneficial owners); Greenfield v. Villager Industries, Inc., supra.

Defendants also seek to support their argument that nominiees will not comply with their fiduciary duty to transmit the notice to beneficial owners by referring to various rules of the major stock exchanges and the National Association of Securities Dealers concerning the responsibility of issuers to pay the cost of a broker's mailings to customers of proxy materials, annual reports or other materials normally received by nominees from issuers. See defendants' Memorandum, pp.10-12. Such rules do not purport to deal with a broker's fiduciary responsibilities to customers or a broker's obligation to transmit class action notices as opposed to material from an issuer. Moreover, even with respect to notices from an issuer, the Securities and Exchange Commission has recognized that "depending on the facts and circumstances, the anti-fraud provisions of the federal securities laws may be applicable" to a broker's failure to transmit to its customer a notice from

an issuer concerning redemption of securities. Karl E. Sommerlatte, CCH [1971-72 transfer binder] Fed.Sec.L.Rep., ¶78,557 (1971).

Defendants also argue that plaintiffs should have to reimburse nominees for identifying beneficial owners and retransmitting the notice to forestall the possibility of collateral attack by beneficial owners who may not personally receive the Notice of Pendency. However, the method of notice proposed by plaintiffs provides adequate protection against collateral attack because such method is the best practicable under the circumstances and is designed to provide individual notice to all class members who can be identified with reasonable effort. See, e.g., In Re National Student Marketing Litigation v. The Barnes Plaintiffs, supra, and In Re Four Seasons Securities Laws Litigation, supra, rejecting collateral attacks by street name shareholders and emphasizing that the method of notice employed--which was consistent with that proposed by plaintiffs herein--was proper under Rule 23 and met constitutional requirements.

Defendants have shown no basis for concluding that the allocation of the costs of identifying beneficial owners of street name securities is relevant to assuring that the method of notice utilized adequately protects the class. In consequence, defendants' request that the order require

plaintiff to pay such costs should be denied.

CONCLUSION

For the reasons given above and in plaintiffs' main Memorandum, the Court should approve plaintiffs' proposed order concerning class certification and method and time of notice.

Dated: New York, New York
September 21, 1976

Respectfully submitted,

MILBERG & WEISS

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Letter from Paul Koepff to Judge Platt
dated September 24, 1976

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CABLE: STETSONLON LONDON

September 24, 1976

Re: Franklin National Bank Securities
Litigation (MDL 196)
Gold v. Ernst & Ernst (75-C-684)

Hon. Thomas C. Platt
United States District Judge
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Platt:

I wish to correct an error in my affidavit submitted in support of the proposed counterorder certifying the class in the Gold action and designating the manner and type of notice. Inadvertantly, I described the $4.60 preferred stock and the capital debentures in my affidavit as securities of Franklin New York Corporation ("FNYC"), when in fact these are securities of Franklin National Bank ("FNB"), purchasers of which are not part of the Gold class.

Except for this matter, the affidavit otherwise remains true. The difficulties in using transfer records to determine the size of the class and the amounts of the respective class members' claimed damages exist for FNYC and for FNB securities.

I apologize for any inconvenience that this may cause.

Respectfully,

Paul R. Koepff

Paul R. Koepff

cc: All Counsel

Memorandum and Order dated
October 27, 1976

A 222

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

IN RE
FRANKLIN NATIONAL BANK SECURITIES
LITIGATION

MDL # 196

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,

Plaintiff,

-and-

LOUIS PERGAMENT,

Intervenor-Plaintiff,

-against-

ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO,

Defendants.

75 C 684

MEMORANDUM AND ORDER

October 27, 1976

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PLATT, D.J.

Pursuant to this Court's memorandum and findings dated April 5, 1976, holding "that the claims of the representative parties [plaintiffs] are typical of the claims of the class described below, that the representative parties will fairly and adequately protect their interests, and that the class should consist of all purchasers of common stock, preferred stock, or capital notes of Franklin New York Corporation who gave their orders for purchase between July 16, 1973 and May 16, 1974," and pursuant to such

memorandum and the decisions made at the pretrial conference held in this Court on September 3, 1976, the liaison attorneys for the class plaintiff have submitted a revised order certifying the class and designating the manner and time of notice and the attorneys for the defendant, Howard D. Crosse, have submitted a counter-order certifying the class and designating the manner and time of notice, and the parties have submitted affidavits and memoranda in support of their respective proposed orders.

The affidavits and memoranda raise two issues; first, whether the plaintiffs must pay the cost of forwarding the notice from the brokerage firms to class members whose securities are held in "street" name, and second, whether the notice to class members should include a voluntary proof of claim form.

In the consolidated amended complaint filed on or about April 1, 1976, in this class action, plaintiff alleges that he is suing on behalf of persons or entities who purchased securities, debt or equity of Franklin New York Corporation ("Franklin") during the period between July 16, 1973 and May 16, 1974, and seeks to recover damages sustained by such purchasers as a result of alleged violations by the defendant of the Federal Securities Laws (§ 10-b of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated thereunder) and the common law. Plaintiff's claims assertedly arise out of alleged failures by defendants to disclose material facts concerning the results of operations and the

economic condition of Franklin's subsidiary, the Franklin National Bank ("FNB").

In essence, plaintiff contends that materially misleading representations and omissions occured in various documents, including Franklin's annual report to shareholders for 1972 and 1973, and Franklin's interim reports to shareholders for the first three quarters of 1973 and the first quarter of 1974. The misrepresentations and omissions alleged include: (i) failure to disclose pervasive uncertainty concerning FNB's ability to survive as a going concern; (ii) wrongful inflation of FNB's income and assets by failing to set forth a sufficient reserve for loan losses; (iii) failure to reveal the importance to FNB's operations of excessive and improper speculation and high risk foreign exchange transactions; (iv) failure to reveal inadequate internal control of foreign exchange trading activities and the existence of numerous activities designed to conceal material foreign exchange losses; (v) wrongfully reporting as an asset certain "tax benefits" which had unlikely prospects of being realized; (vi) overstatement of trading account income and of the value of investment account securities, and (vii) understating of trading account losses.

The main defendants are Franklin's independent accountants, certain former officers and directors of Franklin and FNB and certain former employees in the foreign exchange and international division of FNB. The defendants have interposed general denials and have asserted various defenses, cross-claims and third-party claims.

With respect to the first of the two issues raised by the parties, there are two recent decisions in this Circuit, the first of which indicates and the second of which holds that the "plaintiff, and not the brokerage firms, must bear the cost of notifying class members." Sanders v. Levy, et al., __ F.2d __ (2d Cir., Slip Op. 4577, June 30, 1976); Weiss v. Drew National Corporation, et al., __ F.Supp. __, at p. (S.D.N.Y. 75 Civ. 4816, July 15, 1976).

In the Sanders case the plaintiffs were stockholders of a mutual fund who brought both class and derivative claims against the Fund's directors and investment advisor. For purposes of the derivative claims only, the Fund itself was joined as a nominal defendant but no class claims were asserted against it. The District Court imposed the costs of extracting the names and addresses of the class members from the Fund's magnetic tapes on the Fund. In reversing, the Court of Appeals held that it was "totally improper to impose costs on the Fund" because the Fund was not a party to the class action claims (__ F.2d __, at p. , Slip Op. at p. 4563).

If anything, the facts in the case at bar present an a fortiori situation to the facts in the Sanders case because here the brokerage firms whose customers comprise a part of the class are not as involved as the mutual fund might be said to have been in the Sanders case.

In addition, as indicated, the facts in the Weiss case appear to be on "all fours" with those in the case at bar and Judge Stewart was of the opinion that the Court of Appeals decision in Sanders refusing to impose the costs on the mutual fund was determinative of the question presented here. We agree.

As to the second of the two issues, we fail to see the compelling need to forward at this time a voluntary proof of claim form[1/] but at the same time do not believe it would be improper for the defendants to forward such a notice with the class action notice if the defendants wish to do so. However, in the event they elect so to do they will be required to bear 50% of the costs of mailing (including 50% of the brokerage firm costs) of the class action notice to the class action members and will be required to label the form either "Information for Class Determination" or "Tentative and Voluntary Proof of Claim."

1/ As the plaintiffs point out, the Manual for Complex Litigation appears to advise against doing so (Section 1.46, page 56 (1973).

With respect to paragraph 12 of plaintiffs' proposed Notice, Section 1.45 of the Manual for Complex Litigation (1975 Ed.) at p. 54 suggests[2/] that inquiries by potential members be made to the Court, and that the Court should supervise all responses to such inquiries. This paragraph should be amended to conform to this preferred practice.

The attorneys for the parties herein should confer and submit an appropriate order as soon as possible not inconsistent with the foregoing.

U.S.D.J.

2/ The Tentative Draft of the Fourth Revision of the Manual with Revisions to July 21, 1976 makes it clear that such suggestion is made (at pp. 71, 71a, and 71b) and should be followed.

Plaintiffs' Notice of Motion
dated November 5, 1976

A 228

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, -and- LOUIS PERGAMENT, Intervenor-Plaintiff, -against- ERNST & ERNST, et al., Defendants.	76-C-684 NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that class action plaintiffs will move before the Honorable Thomas C. Platt at 11:30 A.M. on November 17, 1976, or as soon thereafter as counsel may be heard at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, for (a) an order permitting reargument with respect to that portion of the Court's October 27, 1976 order which required class action plaintiffs to bear the expense of identifying class members who are beneficial owners of securities held in street or nominee name; and (b) in the alternative, an order pursuant to 28 U.S.C. 1292(b) amending the Court's order of October 27, 1976 so as to certify an interlocutory appeal from the aforesaid portion of that order.

Dated: New York, New York
November 5, 1976

MILBERG & WEISS

By _____
A Member of the Firm
Liaison Attorneys for Class Action Plaintiffs and Attorneys for Plaintiff Gold
One Pennsylvania Plaza
New York, New York 10001

TO: ALL COUNSEL
in MDL #196

Plaintiffs' Memorandum in Support of
Motion for Reargument and in the
Alternative for Certification of an
Appeal served November 5, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, -and- LOUIS PERGAMENT, Intervenor-Plaintiff, -against- ERNST & ERNST, et al., Defendants.	76-C-684

CLASS PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR REARGUMENT OR IN THE ALTERNATIVE TO AMEND THE COURT'S MEMORANDUM AND ORDER DATED OCTOBER 27, 1976 PURSUANT TO 28 U.S.C. SECTION 1292(b)

In its Memorandum and Order dated October 27, 1976 the Court has held that class plaintiffs must bear the expense of identifying class members who are beneficial owners of Franklin New York Corporation securities but who have chosen to place such securities in street or nominee name. As stated in the affidavit of Melvyn I. Weiss which

accompanied class plaintiffs' memoranda on such issue, the expenses involved threaten to be extremely burdensome, and the Court's holding may have a severe and detrimental impact on the utility of class actions as a key device for the protection of investors.

(a) Motion to Reargue

The issue involved has already been extensively and adequately briefed. Plaintiffs wish to reargue because the Court's October 27, 1976 Memorandum does not discuss in detail the significant issue of whether it is appropriate to require plaintiffs to pay the costs of identifying those class members who have chosen for their and their brokers' convenience to place their stock in the name of another. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) requires only that plaintiffs pay the cost of mailing the notice to those class members who can be identified through reasonable effort, and as shown in plaintiffs' prior memoranda, the requirements of Eisen have normally been deemed satisfied when plaintiffs mailed the class notice to registered owners with suitable instructions to nominees to retransmit the notice to beneficial owners having stock in street or nominee name. The case primarily relied on by this Court for its holding (Sanders v. Levy, _____ F.2d _____, Docket No. 75-7608 (2d Cir. June 30, 1976)), in no way deals

with the issue of whether class plaintiffs should bear the costs of identifying unregistered owners.

Moreover, the October 27, 1976 opinion relies exclusively on precedent which is under reconsideration. As shown in the briefs already filed with the Court on this question, the decision in Sanders v. Levy is presently being reconsidered by the Second Circuit en banc, and the original decision in Sanders may well be modified or reversed. On the district court level, relevant precedent is in conflict. While in Weiss v. Drew National Corp., 75 Civ. 4816 (S.D.N.Y. July 19, 1976), a decision which is also currently under reconsideration, Judge Stewart adopted the same position as that taken by this Court, opposing precedent exists in such cases as Blank v. Talley Industries, Inc., 54 F.R.D. 627 (S.D.N.Y. 1972) and In Re Penn Central Securities Litigation, MDL #56 (E.D.Pa. June 21, 1976).

Finally, reargument is appropriate because the Court has not yet heard oral argument with respect to the governing law.*

* Plaintiffs presented certain practical considerations to the Court at the pretrial conference on September 3, 1976 in response to defendants' recently served proposed counter-order certifying the class. The Court then directed the filing of briefs but no oral argument was scheduled.

(b) Motion to Amend Pursuant to 28 U.S.C. Section 1292(b)

If the Court will not reconsider the relevant portions of its October 27, 1976 Memorandum and Order, class plaintiffs will appeal from such Order to the extent that it imposes costs of identifying beneficial owners of street or nominee name securities on class representatives. While orders allocating costs of notice and costs of identifying class members who are registered owners of securities have been held immediately appealable as of right under 28 U.S.C. §1291 when such costs were allocated to defendants (e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 169-72 (1974); Sanders v. Levy, supra, Slip Opinion, p. 4580), the issue is of such importance that plaintiffs urge the Court to certify the question for an interlocutory appeal, thereby assuring that plaintiffs have an adequate opportunity to appeal in the event that any questions are raised concerning class plaintiffs' right to appeal from the October 27, 1976 Order as a final decision.*

* "If reviewability under some other provision is doubtful, the sensible thing to do is to seek certification from the district court under § 1292(b). If the district court certifies, then both a notice of appeal and an application for permission to appeal can be filed. If a motion to dismiss the appeal is filed, the court of appeals can then consider the petition if it is of the view that the motion must otherwise be granted."

9 Moore's Federal Practice ¶110.22[3], p.263 (1975).

28 U.S.C. §1292(b) provides, inter alia:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."

As shown above, there is "substantial ground for difference of opinion" on the issue of allocation of costs of identifying beneficial owners of street name securities, and the Court's order involves a clear cut question of law. According to Professor Moore, a question "need not be dispositive of the case to qualify as a controlling one", and the courts have tended to equate the controlling question requirement with the requirement that an immediate appeal "may materially advance the ultimate termination of the litigation." 9 Moore's Federal Practice ¶110.22[2], p.260 (1975).

The Courts of this Circuit have recognized that the requirement of an immediate appeal's having potential to materially advance the ultimate termination of the litigation can be satisfied when the movant may be prejudiced by denial of an immediate appeal and if the question has widespread ramifications which indicate that the interests of justice would support an immediate appeal:

"... the effect of an interlocutory appeal on final termination of a controversy involves more than mere chronological calculations. The possibility of practical prejudice if the movant is not given an opportunity to seek appeal, which is all the District Court's certification grants him, may, under certain circumstances, be an appropriate factor for consideration. Shawe v. Wendy Wilson, Inc., 25 F.R.D. 1, 6-7 (S.D.N.Y.), rev'd on other grounds after certification accepted, 282 F. 2d 508, 509 n. 1 (2d Cir. 1960). Cf. Gillespie v. U.S. Steel Corp., 379 U.S. 148, 153-54, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

* * *

"Moreover, as the respondent indicates, the Court's ruling possibly may have widespread ramifications for the conduct of arbitration generally and hence it may be in the interest of justice to present the Court of Appeals with an opportunity to consider and answer the questions raised at the moment in the litigation when they may be most clearly framed. The Court of Appeals has indicated that the unsettled nature of the law dealt with in an interlocutory decision may be a factor in its decision to accept an interlocutory appeal, Goldlawr, Inc. v. Heiman, 273 F.2d 729, 731 (2d Cir. 1959), certification accepted and appeal determined, 288 F.2d 579 (2d Cir. 1961), rev'd on other grounds, 369 U.S. 463, 82 S.Ct 913, 8 L.Ed.2d 39 (1962); Ross v. Bernhard, 403 F.2d 909, 910 (2d Cir. 1970), rev'd on other grounds, 396 U.S. 631, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970) (certification granted on issue of right to jury trial in stockholders' derivative action because 'there is a difference of views in the district court on this question.')" Sobel v. Hertz, Warner & Co., 338 F.Supp. 287, 300 (S.D.N.Y. 1971) (Emphasis added), rev'd on other grounds after the Second Circuit agreed to hear the interlocutory appeal, 469 F.2d 1211 (2d Cir. 1972).

As shown in plaintiffs' memoranda on the allocation of cost issue and in the affidavit of Melvyn I. Weiss

which accompanied such memoranda, the issue is one which has a major impact on this and other class actions, and in consequence, the interests of justice support an immediate appeal. Moreover, a reversal of the decision involved only after a final decision on the merits may not adequately compensate plaintiffs for amounts expended in identifying beneficial owners of street name securities, since plaintiffs may not at the later date be able to obtain reimbursement of such costs. Indeed, any proposal to reimburse plaintiff for such costs from an eventual settlement fund might well be resisted by class members who have not placed their securities in street or nominee name. In consequence, it would appropriate for this Court to amend the October 27, 1976 Memorandum and Order to allow an interlocutory appeal.

CONCLUSION

For the reasons given above, the Court should allow reargument with respect to the allocation of cost issue. If the Court reaffirms its position on such issue, the Court should amend its October 27, 1976 Memorandum and Order to state that in its opinion such order involves a controlling question of law as to which there is substantial ground for difference of opinion with respect to allocation of costs of identifying class members who are beneficial

owners of street or nominee name securities, and that an immediate appeal from such provision of the October 27, 1976 order may materially advance the ultimate termination of the litigation.

Respectfully submitted,

MILBERG & WEISS

By _____
A Member of the Firm

Liaison Attorneys for Class
Plaintiffs and Attorneys for
Plaintiff Gold
One Pennsylvania Plaza
New York, New York 10001
(212) 594-5300

OF COUNSEL:
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Jerome M. Congress

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RABIN & SILVERMAN
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New York, New York 10004

Defendants' Proposed Order Certifying
the Class served November 15, 1976
together with the Attached Proposed
Form of Notice of Pendency of Class Action

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 ORDER CERTIFYING CLASS AND DESIGNATING MANNER AND TIME OF NOTICE

WHEREAS, plaintiff Gold moved by notice of motion dated November 26, 1974, together with an accompanying affidavit of Melvyn I. Weiss and a memorandum of law, for an order certifying that the action of Gold v. Ernst & Ernst, et al. proceed as a class action; certain defendants filed memoranda in opposition to such motion dated June 19, 1975, July 11, 1975, December 18, 1975, and February 5, 1975; plaintiff Gold further filed affidavits of

Jared Specthrie (sworn to July 3, 1975) and of Melvyn I. Weiss (sworn to January 22, 1976), and a Response to Defendants' Sur-Reply Memorandum with Respect to Class Motion, and a Memorandum of Law dated July 3, 1975 in support of the motion; plaintiffs Gold, Mendes and Pergament filed a further memorandum in support of the aforesaid motion dated January 22, 1976; plaintiff Bookstein submitted an affidavit of Robert Kornreich in support of the motion sworn to January 21, 1976; plaintiffs, Gold, Mendes and Pergament filed Answers and Objections to Defendants' Class Action Interrogatories and plaintiff Gold filed an amended complaint on January 15, 1976;

AND WHEREAS, after due deliberation thereon, the Court determined in its Memorandum and Findings dated April 5, 1976 that class certification in the Gold action was proper and that the class should consist of all purchasers of common stock, preferred stock or capital notes of Franklin New York Corporation who "gave their orders for purchase" between July 16, 1973 and May 16, 1974 and further determined in its Memorandum and Order dated October 27, 1976, that plaintiffs must pay the cost of forwarding the notice from brokerage firms to class members whose securities are held in "street" name and that the notice to class members may include a voluntary proof of claim form upon certain conditions, and directed the parties to submit an Order in accordance with the foregoing;

AND WHEREAS, upon further consideration, it appears that the class is more properly defined to consist of all persons who

purchased the above designated securities between the above designated rates (rather than those who gave "orders for purchase" between such dates) in light of mechanical difficulties inherent in the task of determining when the order for purchase was given;

NOW, THEREFORE, IT IS ORDERED, THAT:

1. The action of Gold v. Ernst & Ernst, et al. will proceed as a class action on behalf of all purchasers of common stock, preferred stock, or capital notes of Franklin New York Corporation who purchased any of such securities between July 16, 1973 and May 16, 1974.

2. Plaintiff Gold, intervenor plaintiff Pergament, and plaintiff Mendes of Mendes v. Sindona, et al., are hereby designated as class representatives in the Gold action.

3. The form of notice attached hereto as Exhibit A ("the Notice") is the best Notice practicable under the circumstances to be sent to the members of the class. The Notice is in compliance with Rule 23(c)(2) of the Federal Rules of Civil Procedure.

4. Milberg & Weiss, liaison counsel for the class, be and hereby are designated to carry out the Notice program hereinafter set forth.

5. Milberg & Weiss shall expeditiously take such steps as may be necessary to obtain lists of the names and last known addresses of the class members defined herein in accordance with

the provisions of this Order. Subject to the provisions of paragraph 10 of this Order, any persons who may have books or records containing the names and addresses of the class members or their nominees shall cooperate with Milberg & Weiss and make available to such counsel any and all such lists or other material for inspection and copying. Any such material within the possession, custody, or control of Sol Neil Corbin as trustee in bankruptcy of the Franklin New York Corporation, including lists or other material in the possession of any transfer agents of the Franklin New York Corporation, shall be furnished to Milberg & Weiss within 30 days of the date hereof.

6. On or before 1976, Milberg & Weiss shall cause a copy of the Notice to be mailed by first class mail to members of the class or their nominees, at their last known addresses as they appear on the books and records of the Franklin New York Corporation and/or the records of the transfer agent of Franklin New York Corporation and/or the trustee in bankruptcy of the Franklin New York Corporation.

7. Milberg & Weiss shall promptly rent a numbered Post Office Box in the City of New York, New York, in the name of the Clerk of the Court for the purpose of receiving communications and inquiries regarding Notice of this class action, and exclusion requests. All Notices to class members shall bear the caption of the consolidated litigation herein and of the Gold action, shall be sent in the name of the Clerk of the Court, and shall bear the designation of said Post Office Box as the return address.

8. On or before 1976, plaintiff Gold shall file in the Court proof by affidavit of the mailing of the Notice in compliance with this Order.

9. The Notice shall provide that any request for exclusion be postmarked on or before sixty (60) days from the date of the mailing of the Notice. Plaintiff Gold shall file with the Clerk of the Court and make available to defendants all requests for exclusion as they are received from members of the class in response to the Notice.

10. All costs and expenses incurred incident to the preparation and mailing of the Notice and the Request for Exclusion and Change of Address Form referred to therein, including but not limited to the cost of forwarding to beneficial owners by banks, brokerage firms and other institutions holding record title, shall be borne by the class representatives subject to further Order of the Court. In the event that defendants elect to forward, with the class action notice, the voluntary proof of claim form referred to in paragraph 11 of the Notice, they will be required to bear 50% of the costs of mailing (including 50% of the brokerage firm costs) of the class action notice to the class action members and will be required to label the form either "Information for Class Determinati..." or "Tentative and Voluntary Proof of Claim."

11. The Court reserves jurisdiction pursuant to F.R. Civ. P. 23(c)(1) to modify, alter or amend this Order.

Dated: Brooklyn, New York
, 1976

SO ORDERED:

U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 NOTICE OF PENDENCY OF CLASS ACTION

TO: ALL PURCHASERS OF THE SECURITIES OF FRANKLIN NEW YORK CORPORATION (COMMON STOCK, PREFERRED STOCK, AND CAPITAL NOTES) PURCHASED BETWEEN JULY 16, 1973 AND MAY 16, 1974.

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, you are hereby notified:

1. There is pending in this Court an action entitled Gold v. Ernst & Ernst, et al., Civil Action No. 75-C-684 (hereinafter "the Gold action"). The Gold action is

brought on behalf of persons or entities who purchased securities, debt or equity, of Franklin New York Corporation ("Franklin") during the period between July 16, 1973 and May 16, 1974. The Gold action seeks to recover damages sustained by such purchasers as a result of alleged violations by the defendants of the federal securities laws (Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder) and the common law. The claims arise out of alleged failures by defendants to disclose material facts concerning the results of operations and the economic condition of Franklin's susidiary the Franklin National Bank ("FNB").

2. The pleadings in the Gold action are available for review at the offices of the Clerk of the Court. Plaintiffs generally contend that materially misleading representations and omissions occurred in various documents including Franklin's annual reports to shareholders for 1972 and 1973 and Franklin's interim reports to shareholders for the first three quarters of 1973 and first quarter of 1974. The misrepresentations and omissions alleged include, but are not limited to: (a) failure to disclose pervasive uncertainty concerning FNB's ability to survive as a going concern; (b) wrongful inflation of FNB's income and assets by failing to set forth a sufficient reserve for loan losses; (c) failure to reveal the importance to FNB's operations of

excessive and improper speculation in high risk foreign exchange transactions; (d) failure to reveal inadequate internal control of foreign exchange trading activities and the existence of numerous activities designed to conceal material foreign exchange losses; (e) wrongfully reporting as an asset "tax benefits" which had unlikely prospects of being realized; (f) overstatement of trading account income and of the value of investment account securities; and (g) understating of trading account losses.

3. The defendants involved are Franklin's independent accountants, certain former officers and directors of Franklin and FNB, and certain former employees in the foreign exchange and international divisions of FNB. The defendants have denied liability to the plaintiffs and other class members in respect of the claims in the Gold action and have asserted various defenses, cross claims, and third party claims.

4. Various other actions have been brought concerning the economic collapse of the FNB and liabilities resulting therefrom. A number of such other actions have together with the Gold action been consolidated for pre-trial purposes in the United States District Court for the Eastern District of New York under the title, In Re Franklin National Bank Securities Litigation - M.D.L. #196 (TCP), and the pleadings in such actions are available for review at the

office of the Clerk of the Court. The Gold action is the only action in such consolidated litigation which has been certified as a class action by the Court.

5. Pursuant to a Memorandum and Findings dated April 5, 1976, a Memorandum and Order dated October 27, 1976, and an Order dated , 1976, this Court has determined that the Gold action is a class action on behalf of all members of the public who purchased Franklin common stock, preferred stock or capital notes between July 16, 1973 and May 16, 1974. Class representatives include Robert Gold, who is the plaintiff in the Gold action; Louis Pergament, who intervened as an additional plaintiff in the Gold action; and Freida Mendes, who is the plaintiff in Mendes v. Sindona, et al., a proceeding also consolidated for pre-trial purposes with the other litigation involving Franklin in this Court. The class reprsentatives seek money damages for themselves and for the class as defined above.

6. The Court has not passed upon the merits of the Gold action or the respective claims or defenses and receipt of this Notice does not mean that you are entitled to any recovery. This Notice is merely to advise you of the pendency of the action and your rights with respect to it.

7. All class members will be bound by the results of the pending litigation unless they specifically ask to be

excluded. As a member of the class, you have the option pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure and the Order of this Court to be excluded from the action if you request such exclusion by filling out the form entitled Request for Exclusion enclosed with this Notice and mailing it to

"Clerk, United States District Court
P. O. Box
New York, New York 10001"

If you request exclusion, do not fill out the "Information for Class Determination" form discussed in ¶11.

8. If you request exclusion from the class:

(1) you will be excluded from the class:

(2) you will not be bound by a judgment against the class;

(3) you will not share in a recovery, if any, by the class, by settlement or judgment;

(4) you will not be precluded by reason of your election from prosecuting an individual claim, if timely, regardless of the outcome of the Gold action.

9. Should you wish to be included in the Class as defined in the Gold action, there is no need for you to take any action at this time, and you will continue to be represented by the above named class representatives. Pursuant to Rule 23(c)(2)(C) of the Federal Rules of Civil Procedure,

if you do not request exclusion from the Class you may enter an appearance by counsel of your own choice; otherwise you will be represented by counsel for the class representatives. You may also seek leave to intervene as a party in the Gold action. If plaintiffs are successful, all class members who do not ask to be excluded will share in any recovery; and if judgment is rendered in favor of all defendants, all class members would be denied any recovery.

10. If the plaintiffs do not succeed in this action, persons who do not exclude themselves from the class and who do not enter an appearance by their own attorneys will not be responsible for any of the costs of the litigation. If plaintiffs' counsel are successful and recover a judgment for the class, they will ask the Court for their payment of legal fees and expenses from the money recovered. Any award of fees and expenses rests in the discretion of the Court. If plaintiffs' counsel negotiate a settlement of this action, they will also ask the Court for the payment of their legal fees and expenses from the settlement fund. The Court must approve the terms of the settlement; and any award of fees and expenses rests in the discretion of the Court.

11. Also enclosed with this Notice is a form entitled "Information for Class Determination." If you have completed the Request for Exclusion (see ¶7), do not complete

this form. If you have not requested exclusion complete this form and return it to

"Clerk, United States District Court
P.O. Box
New York, New York 10001"

This form, which is for information purposes and return of which is voluntary on your part, merely asks you to state the losses, if any, you incurred in connection with your acquisition of Franklin New York Corporation Common Stock, Preferred Stock and/or Capital Notes. Please supply all the information, including the amount you paid to acquire the securities (excluding brokerage costs and expenses), the amount you received when you sold the securities (if applicable), and the difference between those two figures, which constitutes your loss.

12. Also appended to this Notice is a Change of Address form. The address to which this Notice was sent is the last address shown in the records of the transfer agent of Franklin New York Corporation. If the address on the envelope mailed to you was incorrect or if you move to a new address, please supply the information required on the Change of Address form and return that form to

"Clerk, United States District Court
P.O. Box
New York, New York 10001"

If the address orginally placed on the evelope containing this Notice was correct, you need not return the Change of Address form.

13. Inquiries regarding the Gold action may be addressed, in writing, to the Clerk of the Court, P. O. Box , Brooklyn, New York 10001.

14. Banks, brokerage firms, and other institutions holding record title as of any day from July 16, 1973 through and including May 16, 1974 to Franklin securities beneficially owned by others are required to forward this notice to the beneficial owners.

15. Pursuant to Federal Rule of Civil Procedure 23(c)(1), the Court reserves jurisdiction to modify, alter or amend the above described Order maintaining the Gold action as a class action at any time before a final disposition of the matters herein described.

Dated: Brooklyn, New York
, 1976

By_____
Clerk

United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 REQUEST FOR EXCLUSION

I hereby request exclusion from the class on whose behalf this action is being brought.

_____
Signature

_____
Name (print or type)

_____
Address

_____
City, State and Zip Code

Dated: _____

A 252

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 INFORMATION FOR CLASS DETERMINATION

Note: Completing and returning this form at the present time is entirely voluntary on your part. Your failure to do so at this time will not preclude you from a recovery in the event plaintiffs are successful in these actions.

Name: _____

Adress: _____

_____

Common Stock

I acquired shares of the common stock of Franklin New York Corporation on _____ at $_____per share for a total price of $_____

I have sold common stock of Franklin New York Corporation as follows:

Date	No. of Shares	Price per Share	Total Price

I have disposed of _____ shares of common stock on _____ 19__, otherwise than by selling them as follows:

I still hold _____ shares of common stock.

Preferred Stock

I acquired _____ shares of the preferred stock of Franklin New York Corporation on _____ at $_____ per share for a total price of $_____

I have sold preferred stock of Franklin New York Corporation as follows:

Date	No. of Shares	Price per Share	Total Price

I have disposed of _____ shares of preferred stock on _____ 19__, otherwise than by selling them as follows:

I still hold _____ shares of preferred stock.

Capital Notes

I acquired $_____ face amount of the capital notes of Franklin New York Corporation on _____ for a total price of $_____.

I have sold capital notes of Franklin New York Corporation as follows:

Date	Face Amount	Total Price

I have disposed of $_____ face amount of capital notes of Franklin New York Corporation, otherwise than by sale, on _____ 19__, as follows:

I still hold $_____ face amount of the capital notes.

I certify that all of the information included in this Proof of Claim is true and accurate.

_____
Signature

Dated:

[If additional space is needed, please use the back of this form.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 CHANGE OF ADDRESS FORM

The address originally placed on the envelope bearing the Notice of Pendency of Class Action was:

_____

_____

_____

The address at which I can be reached currently is:

_____

_____

_____

The address at which I can be reached during the next twelve (12) months is:

_____

_____

_____

I can be reached at this address (as of/during):

_____

_____
(Signature)

Dated:

Plaintiffs' letter to Judge Platt
dated November 18, 1976

MILBERG & WEISS
COUNSELLORS AT LAW
ONE PENNSYLVANIA PLAZA
NEW YORK, N. Y. 10001
(212) 594-5300

MELVYN I. WEISS
LAWRENCE MILBERG
DAVID J. BERSHAD
JARED SPECTHRIE
WILLIAM S. LERACH*
*ADMITTED IN PA. & CAL. ONLY

JEROME M. CONGRESS
MURRAY S. KAPLAN
SAMUEL H. TURETSKY
SHARON LEVINE MIRSKY
SYLVIA L. BECKEY

LEONARD FELDMAN
AARON M. FINE*
*ADMITTED IN PA. ONLY
COUNSEL

CALIFORNIA OFFICE
1200 THIRD AVENUE
SAN DIEGO, CALIFORNIA 92101
(714) 231-1058

November 18, 1976

Hon. Thomas C. Platt
United States District Judge
Unite States Court
Eastern District of New York
225 Cadman Plaza, East
Brooklyn, New York 11201

Re: Franklin National Bank Securities Litigation (MDL No. 196) -- Gold v. Ernst & Ernst (75-C-684)

Dear Judge Platt:

As Liaison counsel for class plaintiffs, we wish to make certain comments in connection with defendants' memorandum in opposition to plaintiffs' pending motion for reargument or Section 1292(b) certification respecting Your Honor's October 27, 1976 Order and concerning defendants' proposed order certifying the class and providing for notice of pendency of class action.

First, we have been informed that on November 15, 1976, the District Court for the Northern District of California denied a motion by a brokerage firm (E.F. Hutton & Co., Inc.) for an order requiring class plaintiffs to absorb brokers' expenses of identifying class members who are beneficial owners of street name securities. The ruling was made from the bench in In re Consolidated Pretrial Proceedings in Ampex Securities Case, Master File No. C-72-360 SW (N.D. Cal.) in response to E.F. Hutton & Co., Inc.'s application for modification of a notice of pendency of class action and of settlement.

Second, defendants' argument that an immediate appeal will delay the ultimate determination of the litigation

is incorrect, since if plaintiffs appeal at a later date and are successful, the litigation would have to continue while plaintiffs pursue the various nominees for reimbursement, possibly in individual proceedings. An early ruling on the issue by the Court of Appeals in a proceeding in which nominee organizations may well file amicus curiae briefs would expedite a definitive resolution of the issue regardless of whether individual nominees are parties to the appeal.

Defendants have submitted a proposed order and form of notice of pendency in response to Your Honor's October 27, 1976 Memorandum and Order. Plaintiffs have not submitted a proposed order because of their decision to appeal if Your Honor reaffirms that order with respect to allocation of nominee expenses for identifying beneficial owners of street name securities. However, plaintiffs have reviewed the order proposed by defendants and have discussed the terms of the proposed order with Ms. Barbara Lee of Poletti Freidin Prashker Feldman & Gartner, the firm which has taken the lead for defendants on issues concerning certification and notice. One the basis of such discussion, I can report that plaintiffs and Poletti Freidin agree to the following changes in defendants' November 15, 1976 proposed order:*

(a) In the last line of paragraph 5 of the order certifying the class, "30 days" should be changed to "15 days".

(b) Deletions should be made in paragraph 11 of the proposed notice of pendency of class action as follows (material to be deleted is in brackets):

---

* Ms. Lee has not yet had the opportunity to discuss these changes with other defendants.

"Also enclosed with the Notice is a form entitled 'Information for Class Determination.' If you have completed the Request for Exclusion (see ¶7), do not complete this form. If you have requested exclusion complete this form and return it to

'Clerk, United States District Court
P.O. Box
New York, New York 10001'

This form which is for information purposes and return of which is voluntary on your part, merely ask you to state [the losses, if any, you incurred in connection with your acquisition of Franklin New York Corporation Common Stock, Preferred Stock and/or Capital Notes. Please supply all the information including] the amount you paid to acquire the securities (excluding brokerage costs and expenses), the amount you received when you sold the securities (if applicable), and the difference between those two figures [which constitutes your loss]."

Plaintiffs requested this change because the deleted language might have seemed to predetermine various issues concerning the proper measure and elements of damages, and may have implied that a class member who retained his securities has no loss.

Ms. Lee and I have both agreed that we understand paragraph 11 of the proposed order certifying the class to require defendants to bear 50% of the costs of identifying (as well as mailing the notice to) beneficial owners in the event that defendants elect to go forward with the voluntary proof of claim.

Finally, in light of class plaintiffs' intention to appeal if Your Honor reaffirms the October 27, 1976 Memorandum and Order, class plaintiffs request the Court not to require plaintiffs to mail the class notice until any appeal by plaintiffs has been heard and decided.

Very truly yours,

MILBERG & WEISS

By Jerome M. Congress
Jerome M. Congress

JMC:JAG
cc: Poletti Freidin Praskher Feldman & Gartner (By Hand)
cc: ALL OTHER COUNSEL

Defendants' letter to Judge Platt
dated November 22, 1976

POLETTI FREIDIN PRASHKER FELDMAN & GARTNER
1185 AVENUE OF THE AMERICAS
NEW YORK, N. Y. 10036

AREA CODE 212
730-7373

TELEX 14-7276

CABLES-POLETFRE

CHARLES POLETTI
COUNSEL

A 260

November 22, 1976

BY HAND

Hon. Thomas C. Platt,
United States District Judge
United States Courthouse, E.D.N.Y.
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Franklin National Bank Securities Litigation
(MDL No. 196) Gold v. Ernst & Ernst (No. 75-C-684)

Dear Judge Platt:

In connection with the motion for reargument submitted November 19, 1976, class plaintiffs argued that the Court should reconsider its order dated October 27, 1976 on the ground, among others, that re-argument had also been requested in Weiss v. Drew National Corp. (S.D.N.Y. 75 Civ. 4816), cited in this Court's October 27 opinion.

On NOvember 18, 1976, Judge Stewart granted plaintiff's motion for reconsideration of his July 15 decision, but adhered to his original decision holding that plaintiff should bear the cost of forwarding notice to class members whose stock is held in "street" name. A copy of Judge Stewart's order, endorsed on plaintiff's motion papers, is enclosed.

Respectfully,

Barbara A. Lee

BAL:mc
Enclosure

cc: Milberg & Weiss (By hand)
All Other Counsel (By mail)

Order Certifying Class and Designating
Time and Manner of Notice dated
November 30, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 ORDER CERTIFYING CLASS AND DESIGNATING MANNER AND TIME OF NOTICE

WHEREAS, plaintiff Gold moved by notice of motion dated November 26, 1974, together with an accompanying affidavit of Melvyn I. Weiss and a memorandum of law, for an order certifying that the action of Gold v. Ernst & Ernst, et al. proceed as a class action; certain defendants filed memoranda in opposition to such motion dated June 19, 1975, July 11, 1975, December 18, 1975, and February 5, 1975; plaintiff Gold further filed affidavits of

Jared Specthrie (sworn to July 3, 1975) and of Melvyn I. Weiss (sworn to January 22, 1976), and a Response to Defendants' Sur-Reply Memorandum with Respect to Class Motion, and a Memorandum of Law dated July 3, 1975 in support of the motion; plaintiffs Gold, Mendes and Pergament filed a further memorandum in support of the aforesaid motion dated January 22, 1976; plaintiff Bookstein submitted an affidavit of Robert Kornreich in support of the motion sworn to January 21, 1976; plaintiffs, Gold, Mendes and Pergament filed Answers and Objections to Defendants' Class Action Interrogatories and plaintiff Gold filed an amended complaint on January 15, 1976;

AND WHEREAS, after due deliberation thereon, the Court determined in its Memorandum and Findings dated April 5, 1976 that class certification in the Gold action was proper and that the class should consist of all purchasers of common stock, preferred stock or capital notes of Franklin New York Corporation who "gave their orders for purchase" between July 16, 1973 and May 16, 1974 and further determined in its Memorandum and Order dated October 27, 1976, that plaintiffs must pay the cost of forwarding the notice from brokerage firms to class members whose securities are held in "street" name and that the notice to class members may include a voluntary proof of claim form upon certain conditions, and directed the parties to submit an Order in accordance with the foregoing;

AND WHEREAS, upon further consideration, it appears that the class is more properly defined to consist of all persons who

purchased the above designated securities between the above designated rates (rather than those who gave "orders for purchase" between such dates) in light of mechanical difficulties inherent in the task of determining when the order for purchase was given;

NOW, THEREFORE, IT IS ORDERED, THAT:

1. The action of Gold v. Ernst & Ernst, et al. will proceed as a class action on behalf of all purchasers of common stock, preferred stock, or capital notes of Franklin New York Corporation who purchased any of such securities between July 16, 1973 and May 16, 1974.

2. Plaintiff Gold, intervenor plaintiff Pergament, and plaintiff Mendes of Mendes v. Sindona, et al., are hereby designated as class representatives in the Gold action.

3. The form of notice attached hereto as Exhibit A ("the Notice") is the best Notice practicable under the circumstances to be sent to the members of the class. The Notice is in compliance with Rule 23(c)(2) of the Federal Rules of Civil Procedure.

4. Milberg & Weiss, liaison counsel for the class, be and hereby are designated to carry out the Notice program hereinafter set forth.

5. Milberg & Weiss shall expeditiously take such steps as may be necessary to obtain lists of the names and last known addresses of the class members defined herein in accordance with

the provisions of this Order. Subject to the provisions of paragraph 10 of this Order, any persons who may have books or records containing the names and addresses of the class members or their nominees shall cooperate with Milberg & Weiss and make available to such counsel any and all such lists or other material for inspection and copying. Any such material within the possession, custody, or control of Sol Neil Corbin as trustee in bankruptcy of the Franklin New York Corporation, including lists or other material in the possession of any transfer agents of the Franklin New York Corporation, shall be furnished to Milberg & Weiss within ~~30~~ 15 days of the date hereof.

6. On or before January 28, 1978, Milberg & Weiss shall cause a copy of the Notice to be mailed by first class mail to members of the class or their nominees, at their last known addresses as they appear on the books and records of the Franklin New York Corporation and/or the records of the transfer agent of Franklin New York Corporation and/or the trustee in bankruptcy of the Franklin New York Corporation.

7. Milberg & Weiss shall promptly rent a numbered Post Office Box in the City of New York, New York, in the name of the Clerk of the Court for the purpose of receiving communications and inquiries regarding Notice of this class action, and exclusion requests. All Notices to class members shall bear the caption of the consolidated litigation herein and of the Gold action, shall be sent in the name of the Clerk of the Court, and shall bear the designation of said Post Office Box as the return address.

TCP

8. On or before January 25, 1978, plaintiff Gold shall file in the Court proof by affidavit of the mailing of the Notice in compliance with this Order.

9. The Notice shall provide that any request for exclusion be postmarked on or before sixty (60) days from the date of the mailing of the Notice. Plaintiff Gold shall file with the Clerk of the Court and make available to defendants all requests for exclusion as they are received from members of the class in response to the Notice.

10. All costs and expenses incurred incident to the preparation and mailing of the Notice and the Request for Exclusion and Change of Address Form referred to therein, including but not limited to the cost of forwarding to beneficial owners by banks, brokerage firms and other institutions holding record title, shall be borne by the class representatives subject to further Order of the Court. In the event that defendants elect to forward, with the class action notice, the voluntary proof of claim form referred to in paragraph 11 of the Notice, they will be required to bear 50% of the costs of mailing (including 50% of the brokerage firm costs of identifying and mailing) of the class action notice to the class action members and will be required to label the form either "Information for Class Determination" or "Tentative and Voluntary Proof of Claim."

TCP

11. The Court reserves jurisdiction pursuant to F.R. Civ. P. 23(c)(1) to modify, alter or amend this Order.

Dated: Brooklyn, New York
November 30, 1976

SO ORDERED:

Thomas C. Platt
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 NOTICE OF PENDENCY OF CLASS ACTION

TO: ALL PURCHASERS OF THE SECURITIES OF FRANKLIN NEW YORK CORPORATION (COMMON STOCK, PREFERRED STOCK, AND CAPITAL NOTES) PURCHASED BETWEEN JULY 16, 1973 AND MAY 16, 1974.

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, you are hereby notified:

1. There is pending in this Court an action entitled Gold v. Ernst & Ernst, et al., Civil Action No. 75-C-684 (hereinafter "the Gold action"). The Gold action is

brought on behalf of persons or entities who purchased securities, debt or equity, of Franklin New York Corporation ("Franklin") during the period between July 16, 1973 and May 16, 1974. The Gold action seeks to recover damages sustained by such purchasers as a result of alleged violations by the defendants of the federal securities laws (Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder) and the common law. The claims arise out of alleged failures by defendants to disclose material facts concerning the results of operations and the economic condition of Franklin's susidiary the Franklin National Bank ("FNB").

2. The pleadings in the Gold action are available for review at the offices of the Clerk of the Court. Plaintiffs generally contend that materially misleading representations and omissions occurred in various documents including Franklin's annual reports to shareholders for 1972 and 1973 and Franklin's interim reports to shareholders for the first three quarters of 1973 and first quarter of 1974. The misrepresentations and omissions alleged include, but are not limited to: (a) failure to disclose pervasive uncertainty concerning FNB's ability to survive as a going concern; (b) wrongful inflation of FNB's income and assets by failing to set forth a sufficient reserve for loan losses; (c) failure to reveal the importance to FNB's operations of

excessive and improper speculation in high risk foreign exchange transactions; (d) failure to reveal inadequate internal control of foreign exchange trading activities and the existence of numerous activities designed to conceal material foreign exchange losses; (e) wrongfully reporting as an asset "tax benefits" which had unlikely prospects of being realized; (f) overstatement of trading account income and of the value of investment account securities; and (g) understating of trading account losses.

3. The defendants involved are Franklin's independent accountants, certain former officers and directors of Franklin and FNB, and certain former employees in the foreign exchange and international divisions of FNB. The defendants have denied liability to the plaintiffs and other class members in respect of the claims in the Gold action and have asserted various defenses, cross claims, and third party claims.

4. Various other actions have been brought concerning the economic collapse of the FNB and liabilities resulting therefrom. A number of such other actions have together with the Gold action been consolidated for pre-trial purposes in the United States District Court for the Eastern District of New York under the title, In Re Franklin National Bank Securities Litigation - M.D.L. #196 (TCP), and the pleadings in such actions are available for review at the

office of the Clerk of the Court. The Gold action is the only action in such consolidated litigation which has been certified as a class action by the Court.

5. Pursuant to a Memorandum and Findings dated April 5, 1976, a Memorandum and Order dated October 27, 1976, and an Order dated , 1976, this Court has determined that the Gold action is a class action on behalf of all members of the public who purchased Franklin common stock, preferred stock or capital notes between July 16, 1973 and May 16, 1974. Class representatives include Robert Gold, who is the plaintiff in the Gold action; Louis Pergament, who intervened as an additional plaintiff in the Gold action; and Freida Mendes, who is the plaintiff in Mendes v. Sindona, et al., a proceeding also consolidated for pre-trial purposes with the other litigation involving Franklin in this Court. The class reprsentatives seek money damages for themselves and for the class as defined above.

6. The Court has not passed upon the merits of the Gold action or the respective claims or defenses and receipt of this Notice does not mean that you are entitled to any recovery. This Notice is merely to advise you of the pendency of the action and your rights with respect to it.

7. All class members will be bound by the results of the pending litigation unless they specifically ask to be

excluded. As a member of the class, you have the option pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure and the Order of this Court to be excluded from the action if you request such exclusion by filling out the form entitled Request for Exclusion enclosed with this Notice and mailing it to

"Clerk, United States District Court
P. O. Box
New York, New York 10001"

If you request exclusion, do not fill out the "Information for Class Determination" form discussed in ¶11.

8. If you request exclusion from the class:

(1) you will be excluded from the class;

(2) you will not be bound by a judgment against the class;

(3) you will not share in a recovery, if any, by the class, by settlement or judgment;

(4) you will not be precluded by reason of your election from prosecuting an individual claim, if timely, regardless of the outcome of the Gold action.

9. Should you wish to be included in the Class as defined in the Gold action, there is no need for you to take any action at this time, and you will continue to be represented by the above named class representatives. Pursuant to Rule 23(c)(2)(C) of the Federal Rules of Civil Procedure,

if you do not request exclusion from the Class you may enter an appearance by counsel of your own choice; otherwise you will be represented by counsel for the class representatives. You may also seek leave to intervene as a party in the Gold action. If plaintiffs are successful, all class members who do not ask to be excluded will share in any recovery; and if judgment is rendered in favor of all defendants, all class members would be denied any recovery.

10. If the plaintiffs do not succeed in this action, persons who do not exclude themselves from the class and who do not enter an appearance by their own attorneys will not be responsible for any of the costs of the litigation. If plaintiffs' counsel are successful and recover a judgment for the class, they will ask the Court for their payment of legal fees and expenses from the money recovered. Any award of fees and expenses rests in the discretion of the Court. If plaintiffs' counsel negotiate a settlement of this action, they will also ask the Court for the payment of their legal fees and expenses from the settlement fund. The Court must approve the terms of the settlement; and any award of fees and expenses rests in the discretion of the Court.

11. Also enclosed with this Notice is a form entitled "Information for Class Determination." If you have comp'eted the Request for Exclusion (see ¶7), do not complete

this form. If you have not requested exclusion complete this form and return it to

"Clerk, United States District Court
P.O. Box
New York, New York 10001"

This form, which is for information purposes and return of which is voluntary on your part, merely asks you to state [the losses, if any, you incurred in connection with your acquisition of Franklin New York Corporation Common Stock, Preferred Stock and/or Capital Notes. Please supply all the information, including] the amount you paid to acquire the securities (excluding brokerage costs and expenses), the amount you received when you sold the securities (if applicable), and the difference between those two figures, [which constitutes your loss.]

12. Also appended to this Notice is a Change of Address form. The address to which this Notice was sent is the last address shown in the records of the transfer agent of Franklin New York Corporation. If the address on the envelope mailed to you was incorrect or if you move to a new address, please supply the information required on the Change of Address form and return that form to

"Clerk, United States District Court
P.O. Box
New York, New York 10001"

If the address orginally placed on the evelope containing this Notice was correct, you need not return the Change of Address form.

13. Inquiries regarding the Gold action may be addressed, in writing, to the Clerk of the Court, P. O. Box , Brooklyn, New York 10001.

14. Banks, brokerage firms, and other institutions holding record title as of any day from July 16, 1973 through and including May 16, 1974 to Franklin securities beneficially owned by others are required to forward this notice to the beneficial owners.

15. Pursuant to Federal Rule of Civil Procedure 23(c)(1), the Court reserves jurisdiction to modify, alter or amend the above described Order maintaining the Gold action as a class action at any time before a final disposition of the matters herein described.

Dated: Brooklyn, New York
, 1976

By_____
Clerk

United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-684 REQUEST FOR EXCLUSION

I hereby request exclusion from the class on whose behalf this action is being brought.

_____
Signature

_____
Name (print or type)

_____
Address

_____
City, State and Zip Code

Dated: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE

FRANKLIN NATIONAL BANK SECURITIES LITIGATION

MDL #196 (TCP)

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,

Plaintiff,

- and -

LOUIS PERGAMENT,

Intervenor-Plaintiff,

- against -

ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO,

Defendants.

75-C-684

INFORMATION FOR CLASS DETERMINATION

Note: Completing and returning this form at the present time is entirely voluntary on your part. Your failure to do so at this time will not preclude you from a recovery in the event plaintiffs are successful in these actions.

Name: _____

Adress: _____

_____

Common Stock

I acquired shares of the common stock of Franklin New York Corporation on _____ at $_____per share for a total price of $_____

I have sold common stock of Franklin New York Corporation as follows:

Date	No. of Shares	Price per Share	Total Price

I have disposed of _____ shares of common stock on _____ 19__, otherwise than by selling them as follows:

I still hold _____ shares of common stock.

Preferred Stock

I acquired _____ shares of the preferred stock of Franklin New York Corporation on _____ at $_____ per share for a total price of $_____

I have sold preferred stock of Franklin New York Corporation as follows:

Date	No. of Shares	Price per Share	Total Price

I have disposed of _____ shares of preferred stock on _____ 19__, otherwise than by selling them as follows:

I still hold _____ shares of preferred stock.

Capital Notes

I acquired $_____ face amount of the capital notes of Franklin New York Corporation on _____ for a total price of $_____.

I have sold capital notes of Franklin New York Corporation as follows:

Date	Face Amount	Total Price

I have disposed of $_____ face amount of capital notes of Franklin New York Corporation, otherwise than by sale, on _____ 19__, as follows:

I still hold $_____ face amount of the capital notes.

I certify that all of the information included in this Proof of Claim is true and accurate.

_____
Signature

Dated:

[If additional space is needed, please use the back of this form.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE FRANKLIN NATIONAL BANK SECURITIES LITIGATION	MDL #196 (TCP)
ROBERT COLD, on behalf of himself and on behalf of all others similarly situated, Plaintiff, - and - LOUIS PERGAMENT, Intervenor-Plaintiff, - against - ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO, Defendants.	75-C-584 CHANGE OF ADDRESS FORM

The address originally placed on the envelope bearing the Notice of Pendency of Class Action was:

_____

_____

_____

The address at which I can be reached currently is:

_____

_____

_____

The address at which I can be reached during the next twelve (12) months is:

_____

_____

_____

I can be reached at this address (as of/during):

_____

_____
(Signature)

Dated:

Supplemental Memorandum and Order
dated November 30, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

IN RE
FRANKLIN NATIONAL BANK SECURITIES LITIGATION

MDL # 196

---

75 C 684

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,

Plaintiff,

-and-

LOUIS PERGAMENT,

Intervenor-Plaintiff,

-against-

ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD H. EMRICH, ROBERT C. PANEPINTO,

Defendants.

SUPPLEMENTAL MEMORANDUM AND ORDER

November 30, 1976

- -x

PLATT, D.J.

Plaintiffs move for an order permitting reargument with respect to that portion of the Court's order dated October 27, 1976, which requires class action plaintiffs to bear the expense of identifying class members who are beneficial owners of securities held in street or nominee name or, alternatively, for an order pursuant to 28 U.S.C. § 1292(b) amending the Court's order of October 27, 1976, so as to certify an interlocutory appeal from the aforesaid portion of that order.

With respect to plaintiffs' motion to reargue, the Court grants such motion and after further consideration adheres to its original decision in its Memorandum dated October 27, 1976.

With respect to the alternative portion of such motion, liaison counsel for class plaintiffs have stated that if the Court certifies the foregoing question for an interlocutory appeal, they will expeditiously appeal this question to the Court of Appeals for this Circuit.

The Court will grant such request on condition that (after the defendants furnish to the plaintiffs within 10 days after the date hereof a list of the known nominees) liaison counsel at plaintiffs' expense (i) must furnish each of such nominees with a copy of this Court's Memorandum dated October 27, 1976, (ii) notify them that they are taking an immediate appeal to the Court of Appeals and (iii) advise them that they may wish to refer the matter to their counsel for appropriate action.

The other time provisions contained in the attached order dated November 30 , 1976, are stayed until the resolution of such question on the proposed appeal. Should liaison counsel not proceed expeditiously on the proposed appeal, this Court will entertain an application to vacate this supplemental order.

Accordingly, the following certification will be deemed to be a part of the attached order dated November 30, 1976:

The undersigned is of the opinion that the attached order involves a controlling question of law as to which there is substantial ground of difference of opinion and that an immediate appeal from the attached order as authorized by 28 U.S.C. § 1292(b) may materially advance the ultimate termination of this litigation. It is ordered that all proceedings herein be stayed for 10 days from date of entry of this and the attached order. If, within such 10 days, the plaintiffs shall apply to the United States Court of Appeals for the Second Circuit for permission to appeal from this order and if the plaintiffs proceed as expeditiously as possible with such appeal, the proceedings herein shall be stayed pending determination of such application or of the appeal, if it is allowed.

SO ORDERED.

Thos. C. Platt

U.S.D.J.

Letter from Sara Steinbock to Milberg
& Weiss dated December 10, 1976

A 284

P. NELSON ADAMS
LAWRENCE E. WALSH
S. HAZARD GILLESPIE
ANDREW Y. ROGERS
TAGGART WHIPPLE
PETER O. A. SOLBERT
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WILLIAM D. TUCKER, JR.
C. PAYSON COLEMAN
PETER A. BATOR
JOHN P. CARROLL, JR.
WILLIAM A. RAYNOR
HENRY L. KING
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SAMUEL F. PRYOR III
EDWARD S. REID
PHILIP C. POTTER, JR.
JOHN I. RHOADS
JAMES F. DOLAN
RICHARD E. NOLAN
JOHN A. CORRY
RICHARD D. SPIZZIRRI
ALLAN A. A. FLYNN
CHARLES S. HOPPIN (LONDON)
JOEL J. COHEN
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JOHN J. MCATEE, JR.
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CABLE: STETSONLON LONDON

December 10, 1976

Re: Franklin National Bank Securities Litigation

Jerome M. Congress, Esq.
Milberg & Weiss
One Pennsylvania Plaza
New York, New York 10001

Dear Mr. Congress:

Pursuant to Judge Platt's Memorandum and Order of November 30, 1975, enclosed please find a list of nominee names of beneficial owners of Franklin National Bank securities within the class. The enclosed list was compiled from transfer journals obtained by defendants in October, 1975. Because some of the entries on the transfer sheets in our possession were illegible or unclear, I have arranged to obtain the transfer sheets for the class period from Bradford Trust Company and Morgan Guaranty Trust Company. These additional transfer sheets, which I expect to be provided within the next few days, should clarify any omissions or ambiguities in the list provided herewith.

Defendants have made every effort to provide a complete list of nominees. A group of paralegals working under my supervision reviewed every entry on the transfer sheets in our possession. Nonetheless, I believe there are possible problems with the enclosed list which should be brought to your attention.

The enclosed list was compiled from transfer journals of January 1973 through May 1974. It therefore may include nominees outside the class of those who purchased securities between July 16, 1973 and May 16, 1974. As noted above, a number of the entries on the transfer sheets in our possession were illegible. In addition, there appeared to be many typographical errors. In order to compile as complete a list as possible, we included names which appeared to be close to another name previously listed, although it is likely that the two listings were a result of typographical errors and the two companies were, in fact, the same. The transfer sheets did not indicate addresses for all of the listed holders. An initial attempt to obtain these addresses was made. However, because many of these nominees are not in New York, their addresses could not be ascertained. Hopefully, the missing addresses will be provided on the transfer sheets from Bradford Trust and Morgan Guaranty.

The transfer sheets do not indicate whether the names listed are nominees. In order to include all possible nominees, all names which were clearly not individuals were included, although it is likely that some of the companies listed are holding the securities for their own accounts. It is also possible, of course, that individuals, who are not listed, are holding securities for another party. Because it is impossible to determine with complete accuracy which names on the transfer sheets are nominees, it may be advisable to transmit the transfer sheets from Bradford Trust Company and Morgan Guaranty directly to you, without an attempt on the part of defendants to cull apparent nominees.

We will make every effort to refine the enclosed list if at all possible. Please do not hesitate to contact me if you have any questions regarding this matter.

Very truly yours,

Sara E. Steinbock

Sara E. Steinbock

cc: Honorable Thomas C. Platt

Barbara Lee, Esq.
Jeffrey Kossak, Esq.
William Sparks, Esq.
Bernard McCarthy, Esq.

cc: All Other Counsel

Letter from Sara Steinbock to Milberg
& Weiss dated December 29, 1976

D. NELSON ADAMS
LAWRENCE E. WALSH
S. HAZARD GILLESPIE
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December 29, 1976

Re: In Re Franklin National Bank
Securities Litigation (MDL #196)

Jerome M. Congress, Esq.
Milberg & Weiss
One Pennsylvania Plaza
New York, New York 10001

Dear Mr. Congress:

Enclosed please find a revised list of nominee names of beneficial owners of Franklin National Bank securities and the transfer sheets from Morgan Guaranty Trust Company for the period of July 16, 1973 through May 16, 1974.

The enclosed lists refine the lists which defendants submitted to you on December 10, 1976 pursuant to Judge Platt's Memorandum and Order of November 30, 1976. We have used the transfer sheets obtained by Morgan Guaranty Trust Company and the 1976 Nominee List of American Society of Corporate Secretaries to clarify, where possible, omissions or ambiguities in the lists compiled from the transfer sheets in our possession. As you will see, the addresses of many nominees have now been found and illegible entries on the prior transfer sheets have been corrected.

We have been informed by Bradford Trust Company that due to computer problems there will be a substantial delay in compiling their transfer sheets for the relevant

time period. Because their transfer sheets would merely be a third check on the lists already provided, we believe that the lists submitted herewith represent as complete data as defendants are able to provide at this time.

Please do not hesitate to contact me if you have any further questions regarding this matter.

Very truly yours,

Sara E. Steinbock

Sara E. Steinbock

cc: Honorable Thomas C. Platt

Barbara Lee, Esq.
Jeffrey Kossak, Esq.
William Sparks, Esq.
Bernard McCarthy, Esq.

All Other Counsel

Letter from Milberg & Weiss to Judge Platt dated January 6, 1977, together with enclosure

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(714) 231-1058

January 6, 1977

Honorable Thomas C. Platt
United States District Court
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: In Re Franklin National Bank Securities Litigation (MDL #176)--
Gold, et al. v. Ernst & Ernst, et al.
(75-C-684)

Dear Judge Platt:

In response to Your Honor's November 30, 1976 Memorandum and Order, defendants have provided plaintiffs with a revised list of all companies listed on certain transfer records of the Franklin New York Corporation, and have identified that list as the best which they can presently prepare of companies which may have purchased Franklin New York Corporation securities during the class period as nominees.

This letter is to inform Your Honor that plaintiffs have now mailed copies of the enclosed letter, together with copies of Your Honor's October 27, 1976 Memorandum and Order, to each of the 661 companies on defendants' list for which defendants were able to provide addresses.

Very truly yours,

Jerome Congress

Jerome M. Congress

JMC/rl
cc: Jessel Rothman, Esq.
Anderson Russell Kill & Olick, P.C.
Poletti Freidin Prashker Feldman & Gartner
Battle, Fowler, Lidstone, Jaffin, Pierce & Kheel
DiFalco, Field, Lomenzo & O'Rourke
Dewey, Ballantine, Bushby, Palmer & Wood
Mudge, Rose, Guthrie & Alexander
Davis Polk & Wardwell
Gerard A. Imperato

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(714) 231-1058

December 30, 1976

To: Any Person or Institution Which Held Record Title to Securities of Franklin New York Corporation (including common stock, preferred stock, or capital notes) Purchased at any Date During the Period From July 16, 1973 to and including May 16, 1974, Which Securities were Beneficially Owned by Others:

Please be advised that an action entitled "Gold, et al. v. Ernst & Ernst, et al., Docket No. 75-C-684 ("the Gold action") is currently pending in the United States District Court for the Eastern District of New York. Plaintiffs in the Gold action have brought suit on behalf of purchasers of securities of Franklin New York Corporation ("Franklin") to recover damages sustained by such purchasers as a result of alleged violations of the federal securities laws and the common law. The claims arise out of alleged misrepresentations and failures by defendants to disclose material facts with respect to the results of operations and economic conditions of Franklin's subsidiary, The Franklin National Bank.

The Court has certified the Gold action as a class action on behalf of persons who purchased Franklin securities during the period from July 16, 1973 to and including May 16, 1974. The Court has further directed that notice of pendency of the Gold action be mailed to class members or their nominees as they appear on the books and records of Franklin or its transfer agents, with instructions to banks, brokerage firms, and other institutions holding record title to retransmit the notice of pendency to beneficial owners.

In a Memorandum and Order dated October 27, 1976, a copy of which is enclosed, the Court ruled that class representatives must reimburse banks, brokerage firms, and other institutions which held record title to the relevant Franklin securities for expenses incurred in identifying beneficial owners of such securities for the purpose of transmitting the notice of pendency of class action to them.

Your name has been provided to us by defendants in the Gold action as a successor of Franklin securities during the relevant period which may have purchased as a nominee. Pursuant to a Court order dated November 24, 1976, you are hereby notified that plaintiffs in the Gold action are taking an immediate appeal to the United States Court of Appeals for the Second Circuit from the Court's ruling that plaintiffs must bear the expense of identifying beneficial owners of securities held in street or nominee name. You may wish to refer this matter to your counsel for appropriate action.

Very truly yours,

MILBERG & WEISS

By _____
Liaison Attorneys for Class Action
Plaintiffs and Attorneys for
Plaintiff Robert Gold

pc

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

YVETTE KARPO being duly sworn, deposes and says that she is in the employ of Milberg & Weiss, attorneys for the within named Plaintiff-Appellant Robert Gold herein, and is over the age of 21 years. That on the 11th day of February, 1977, she served the within Joint Appendix upon the attorneys for the respective parties named on Attachment "A", by depositing a true copy of the same to each of them, securely enclosed in postpaid wrappers in a post office box regularly maintained by the United States Government at One Pennsylvania Plaza, New York, New York, directed to each of them at their respective addresses set forth below, those being the addresses within the State designated by them for that purpose on the preceding papers in this action, or the places where they then kept their respective offices between which places there then was and now is a regular communication by mail:

SEE ATTACHMENT "A"

Yvette Karpo
YVETTE KARPO

Sworn to before me this
11th day of February, 1977.

Judith Goodhart
Notary Public

JUDITH GOODHART
Notary Public, State of New York
No. 41-4630261
Qualified in Queens County
Commission Expires March 30, 1978

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ATTACHMENT - "A"

Received

[illegible] GARTNER

Howard Crosse

Date February 11, 1977

Time 4:50 p.m.

R.W.